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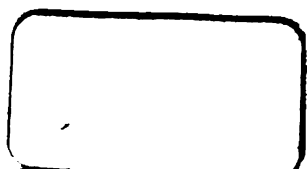
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A Treatise on International Law

With an Introductory Essay
on
The Definition and Nature of the Laws
of Human Conduct

BY
ROLAND R. FOULKE
Of the Philadelphia Bar

STANFORD LIBRARY

VOLUME I

THE JOHN C. WINSTON CO., *Publishers*
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1920

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PREFACE

This book has been written in the attempt to clear away some of the many obscurities and misconceptions which pervade the subject of international law and which are not only discouraging to the student but irritating to the mature reader. It goes without saying, that a subject which has been cultivated as international law has, in practically the same furrows for many centuries, will prove a rich mine for analytical investigation. The author does not pretend to have any more than scraped the surface, but hopes he has succeeded in a more logical arrangement than that commonly found in the writers. There has been some talk recently about popularizing international law. It would be as feasible to popularize the binomial theorem, the laws of optics or the rule against perpetuities. The masses must be content to be advised on these matters by experts. He who would understand international law must be something of a man of the world, have a good knowledge of history and economics, the faculty of clear thought, and, above all, must not let his heart run away with his head. No attempt has been made at exhaustive citation, but it is believed that the notes are sufficient to illustrate the text. All citations are to the pages unless otherwise indicated, and a general index to both volumes, including authors, and cases referred to, is inserted in each volume.

ROLAND R. FOULKE.

Philadelphia, Pa., U. S. A., July 1, 1919.

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PART I

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CHAPTER I.

DEFINITION AND NATURE OF LAW.

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PRELIMINARY.

§1. The object of the first chapter is to discuss the nature, definition and origin of law in order that we may have as clear an idea as possible on that point before undertaking to investigate international law. As we shall see, there are a number of possible conceptions of what law is. The writers generally fail to distinguish these different conceptions and to recognize that it is impossible to understand international law if we cling to one of them, to the exclusion of the others.¹

FUNDAMENTAL ASSUMPTION.

§2. The discussion will be based upon the assumption that law, whatever it is, has something to do with human conduct, whatever other objects it may have to do with also, and this assumption will furthermore be narrowed in its scope by excluding everything with which the law may have to do except human conduct, as, for instance, the operations of nature. The first inquiry, therefore, is as to human conduct.

DEFINITION OF HUMAN CONDUCT.

§3. The word "conduct" is usually confined to acts of human beings and may be defined as an adjustment of acts to ends. Conduct exhibits itself to man as a fact, and the philosophy of law is concerned with the proper jural conception of the external aspect of that conduct. The philosophy of ethics excludes conduct without purpose, but the jural conception includes that which is apparently conduct, even though it is not conduct in the ethical sense. The attention of the legal philosopher is directed to the acts of human beings which are externally apparent and to certain factors determining those acts. We must also remember that the factors determining conduct are restraints on conduct, generally restraints on the operation of the factors of self interest, and instinct. The first great distinction, therefore, is between restrained and unrestrained conduct, and we do not enter the region of law until we reach the limits of restrained conduct. Our first inquiry, therefore, is as to conduct as a fact,

¹ The first chapter is somewhat brief and fragmentary, but is believed to be sufficient to indicate the conception of law upon which the discussion is based. The pure philosophy of the law deserves

a separate treatise, and this short summary is only necessary because of the inextricable confusion in the writers, which makes it impossible to find any clear proposition as a starting point.

which is the background of the discussion. Our next step is to consider the restraints on that conduct, their classification, description and operation. Then we shall be in a position to consider the meaning of the word "law."

INTERESTS—DEFINITION OF—HOW AFFECTED—PROTECTED AND UNPROTECTED.

§4. Since conduct revolves around interests, it is important to understand what we mean by an interest before pursuing the inquiry into the factors which determine conduct. I have an interest in an object when I will be affected in any way by any change in that object, whether that change is produced by an outside agency or occurs in the object itself. This interest may vary in intensity from mere idle curiosity to absorption of my entire welfare. The principal object in which man is interested is himself, and self-interest is therefore the greatest interest in the world. The number of possible interests for an individual in any community will be determined by the economic development and civilization of that community.² As the objects which existed in primitive life were few, and the intellectual and ethical development of the members of the community was limited, the number of interests which actually existed was small compared to the diversity which may be enumerated in a modern civilized community. My interest in an object may be affected by (A) a change in my attitude toward the object, (B) a change in the object itself, (C) the action of some outside agency.³ Since we are dealing only with human conduct, we shall confine our attention to the cases where the interest is affected by such conduct, and exclude the action of the forces of nature. Our attention will be confined to an interest in a human being, and an interest in any object other than a human being where the interest is affected by the conduct of

² The number of interests in a community will correspond to (a) the variety of objects which exist in the community, (b) the variety of objects outside to which the community has assumed some relation, (c) the intellectual and ethical development of the members of the community. There are more possible interests in New York and London than there are in Patagonia or Thibet.

³ My interest in an—
Inanimate object will be affected by
The forces of nature
The conduct of man
Animate object by
Forces of nature
Act of the object
Conduct of man
and in either case by a change in my attitude toward the object.

Factors Determining Conduct

§5

a human being. If, therefore, I have an interest in a horse, and my interest is affected by the horse running away, there is a case outside the discussion.

Interests are protected and unprotected. I may have an interest, for instance, if I am an artist, in the picture of a great master hanging in the Louvre, and if that picture is destroyed by fire or carried off by an invading enemy, my interest is affected; whereas, my neighbor, who is not an artist, will have no interest in the picture and be entirely unconcerned by its removal or destruction. In like manner, I have an interest in my neighbor, which interest is affected, according to my attitude toward that neighbor, by his death or by hearing some spicy piece of scandal about him or his wife. These are instances of unprotected interests, that is, interests which may be affected without my being able to obtain any redress either through my own efforts or through the assistance of external aid. An interest is protected when I am able to set in motion some external means of determining the conduct which is affecting the interest.

Two or more persons may have the same interest—a joint or collective interest, and a body of individuals may have an interest in the body as such or in some outside object. A classification of the interests which exist in the modern world lies outside the scope of this discussion. The enumeration we have made will be found sufficient to indicate the scope of the treatise which will relate to the conduct and interests of certain bodies of individuals, to-wit, independent states.

Factors Determining Conduct.

PRELIMINARY.

§5. The conduct of a human being will be determined by an infinite number of factors which, however, may be arranged under two headings: (A) internal, those arising from the characteristic of man himself as a human being; (B) external, those proceeding from objects external to the particular human being whose conduct is affected. It is important to clearly distinguish these factors, because conduct is one thing, and the factors influencing conduct are something else, and much confusion prevails because of the failure to keep the distinction clearly in mind.⁴

⁴ Table showing arrangement of discussion of factors determining conduct:
Internal—inherent in man

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| Reason..... | §8 |
| Habit..... | §9 |

§§6, 7, 8

Instinct, Reason

Factors Inherent in Man Determining Conduct.

PRELIMINARY.

§6. The conduct of man as a rational animal is determined very largely by factors to be learned only by examination of the nature of man himself. The discussion of the internal characteristics of man is unnecessary to the discussion and may be left to the branches of learning devoted to those subjects. We start with the assumption that conduct is determined in many instances by impulses inherent in man, and proceed upon the following rough classification of those impulses: (A) Instinct. (B) Reason. (C) Habit. (D) Attitude towards self-interest. (E) Attitude toward interest of others. These will be considered in the order named. The importance of this classification of internal factors lies in the fact that it helps to make clear the distinction between external and internal factors, a distinction which is of vital importance to the further understanding of the discussion. A large part of the obscurity in the discussion of the nature and meaning of law as it appears in the current writings arises from a failure to keep this distinction clearly in mind.

INSTINCTS.

§7. Instincts are perhaps the most important internal factors determining conduct, but do not require any extended reference. It is sufficiently clear that man is governed in the main by hunger, thirst, sex, desire of life, instinct of self-preservation, etc., and that these are the fundamental underlying motives or impulses of conduct. There is a distinction perhaps between animal desires and instincts which, however, is unnecessary for our purpose. We are only concerned with the external manifestations of these factors. There is, however, one instinct which is of great importance in our discussion, that is, the gregarious instinct. Man is a gregarious animal, and the consequent association with his fellow men produces external factors determining conduct which would be absent if he lived alone.

REASON.

§8. The human intellect is imitative, disinclined to think, and has a great reverence for the past and that which has already been

| | | | |
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arranged and accomplished. The ideas of most men are inherited from their ancestors, continue without change during life, and are handed down to posterity with very few alterations, and this is particularly true of ideas relating to the ordinary daily conduct of humanity. A few minds are, from time to time, able to rise above the intellectual level of the mass of men and evolve new ideas. Clear thought is extremely rare, and there is a universal dislike of that which is unknown and a fear of any change, and these characteristics are not very much modified by modern civilization. The minds of the mass of men move so slowly that they cannot keep up with the change in the world, and the vast majority of human beings are a generation behind the vanguard of society. The average man will go where the crowd goes and do what the crowd does without any thought whether that is the best thing to do or not.

The prevailing ideas in a community determine the conduct of the members of that community, and in every mass of men the same idea prevails generally as to conduct upon a particular occasion. There is therefore in such bodies of men a uniformity of conduct. This is amply demonstrated by the immense difficulty of teaching the mass of the people sanitation, cleanliness and obedience to the rules of health. The prejudice on these points, which has obtained for generations, is a great obstacle to any improvement. If the change is to the self-interest of the individual, modifications in conduct can be introduced more quickly. Every man's conduct conforms to his ideas and education, with the additional proposition that the mass of men have, under the same circumstances, the same ideas. Uniformity of action springs from identity of idea, which identity of idea in the same community is a fact of human nature.

HABIT.

§9. The conduct of man is, to a large extent, unconscious and individuals adjust themselves to each other in following the conduct to which they were impelled by natural instinct. In the case of the lower animals, such activities are described as habit. The same is true of man. There is a large part of his conduct which is merely habit.⁵ Man unconsciously repeats a former act which has produced

⁵ "The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common. One man crosses the common, in the direction which is suggested either by the purpose he has in

view, or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made." Holland, *Jurisprudence*, 10 ed., p. 55. (1908).

§§10, 11, 12

Attitude of Man

a reaction of pleasure, and by reason of this and of the intellectual tendencies we have referred to, he continues to follow the same conduct. Most of the conduct in a community is largely a matter of habit, and all the members of all communities of men dwell together in surprising amity and accord. The principal conflict is between communities. It seems perfectly clear, from the examples that have been adduced from the life of primitive peoples, that many communities will follow conduct without having any idea of the meaning of their acts. Thus, in some tribes, there will be elaborate marriage ceremonies or sacred dances which no one is able to explain or give any reason for. These instances clearly illustrate the tremendous effect of habit on the conduct of the members of the community.

ATTITUDE TOWARD SELF INTEREST.

§10. The attitude of man toward his own interest has a very powerful effect upon conduct and determines to a very large extent the conduct of most individuals in the community. It is only necessary to notice that such attitude exists in the majority of instances, and that always in studying conduct we must recognize the existence of this attitude, and the great effect it will have upon conduct in any particular case. Self-interest is the greatest of all possible interests in the world and is of special importance in international law.

ATTITUDE TOWARD INTEREST OF OTHERS.

§11. The attitude of an individual toward the interest of others, which is generally one of indifference, may affect his conduct where the individual has a regard for these interests which leads him to respect them. This is what is sometimes referred to as altruistic motives of conduct, and is the least effective of all inward characteristics of man determining conduct. The motives of conduct, as egoism or altruism, are immaterial to us, as we are only concerned with conduct as a fact, whether conduct be good or bad, according to any particular standard.

External Factors Influencing Conduct.

FORCES OF NATURE.

§12. The conduct of man is also determined by the forces of nature. Among these are climatic and geographic conditions, storms,

Factors Determining Conduct

§13

powers of the sea, etc. No attempt has ever been made to form a jural conception of these influences upon conduct because they are facts which are entirely beyond the control of man. It is of great importance, in order to illustrate or to ascertain the development of various races of man, to know how climatic conditions influence conduct. It is unnecessary, however, for the legal philosopher to burden himself with that investigation. It is sufficient for him to know that conduct is in fact so influenced, and to separate in his investigation conduct so influenced from conduct influenced by other factors, and then disregard the forces of nature as unnecessary to the discussion. It is true that in the municipal law, the circumstance that conduct has been determined by a force of nature to be other than that which would have been followed without the operation of the force of nature, is oftentimes of importance in ascertaining whether a given individual will or will not be excused from liability by reason of the variation in conduct produced by the operation of the force. In this case, the court is simply recognizing the fact that conduct is in fact so determined.

Factors Other Than Forces of Nature.

PRELIMINARY. THE GREGARIOUSNESS OF MAN.

§13. Man is a gregarious animal and universally lives with his fellowman. The few cases which have occurred of a man living alone and entirely cut off from other men are so rare and abnormal that no account need be taken of them. The gregarious instinct was perhaps developed among animals from the advantage to the individual from a common effort and association. Civilized man owes his present advanced state largely to co-operation, and, without it, modern civilization would perish. It is utterly immaterial to our discussion whether the gregarious instinct of itself has produced a closer association of men or whether economic changes and the advantages and protection of such association developed and accentuated the instinct of gregariousness. This gregariousness brings man into more or less contact with his fellowmen, with the result, therefore, that his conduct will be influenced by pressure from these other men, which will be discussed under the heading of (A) influences apart from political power, and (B) those arising from the exercise of political power.

§§14, 15, 16

Pressure from Other Individuals

PRESSURE FROM OTHER INDIVIDUALS APART FROM POLITICAL POWER.

§14. The pressure of other individuals will vary from the gentle influences of love and friendship and appeals to reason, to intimidation or overpowering force. It is impossible to draw any line and say when the conduct ceases to be determined by the inherent factors and when it begins to be influenced by direct external compulsion. The influence of public opinion may partake of each. In most cases, it will be impossible to tell which of these various factors has a preponderating influence, and they may often work at cross-purposes. We can, however, in theory separate the elements of external compulsion and distinguish between (A) individual compulsion,⁶ as the command of a father to his child, (B) the collective compulsion of a number of individuals, as for instance, the pressure of a labor union which compels a workman to become a member or else lose his job, (C) the political power of the state. The idea is not an external factor determining conduct although the idea may be changed by influences from without. It is not always easy to tell when the idea has been changed by external influence and when it has not.

Pressure From Political Power.

PRELIMINARY.

§15. The political power of the community is a factor of great importance in determining human conduct. First, however, we must inquire what this political power is, and how it is manifested.

DEFINITION OF THE COMMUNITY.

§16. The community has already been referred to several times, and there seems to be some little difficulty about the meaning of the word. A community consists of a number of men permanently living together.⁷ Man has always lived in a community of some

⁶ An individual may determine the conduct of another by intimidation or by the exercise of force. The instances of such action will vary in different communities according to development and civilization.

⁷ "A community may be said to be the body of a number of individuals more or less bound together through

such common interests as create a constant and manifold intercourse between the single individuals." 1 Oppenheim, *Int. L.*, 2 ed. (1912) 10. It is unnecessary to add to the definition the statement that they are united by the same interest because they will not live together unless they are so united, and the word "community" clearly

sort, and there has always been some bond by which the members of the community really are, or are conceived to be, bound together.⁸ There is some difference of opinion as to what was the original type of this organization, and it is not clear just what was the historical sequence of the various forms which have appeared. It is, however, immaterial, for the purposes in hand, what conclusion may be reached on these points. The jural conception of that organization and its relation to law is the same in any case. It is sufficient for the legal philosopher to know that such institutions have existed and do exist, and to confine his attention to the part they play in the development and conception of law.

The members of a community come into it involuntarily, by birth, capture, or being brought in under disability; and voluntarily under some regulation adopted by the community.⁹ In ancient times, there was some kind of adoption; in modern times, it is by naturalization.¹⁰ The members of a community may withdraw in the absence of any regulation to the contrary,¹¹ and self-interest may or may not impel a number to remain. A number of individuals thus bound together have, from the fact of that bond and their common association, a collective force or power which will be of varying strength and exercised in different ways and under different forms, according to the economic development and civilization of the community.

THE ORGANIZATION OF THE COMMUNITY.

§17. This community of men has always had some organization in all examples of human life which have been discovered to have existed in the past or which exist in the world today. Such organiza-

conveys the idea of such a union. This definition, furthermore, confines the word to the body of the individuals, whereas, it is conceived, it more properly refers to the individuals taken together collectively, the body as an organization, or the government.

⁸ The various bonds which have appeared are as follows:

Blood

Real

Artificial—adopted

Tribal

Feudal vassalage

National

Relationship from dwelling together in the same territory.

⁹ Membership in a Community.

Involuntary

By birth

By captivity

By being brought in under disability.

Voluntary—by admission into the community

Fiction of adoption, ancient,

Naturalization, modern.

¹⁰ See §§430, et seq. post, on membership in the state.

¹¹ See §428, post, on movement of individuals from one state to another.

§18

The State

tion appears among many of the lower animals, as, for instance, the ant. It may be assumed, therefore, that the instinct and fact of organization is as old, if not older, than man himself. The great mistake made by the legal philosophers is in not having a sufficiently enlarged historical perspective. It is common to suppose that because our written records of law and political institutions only go back a few thousand years, that we have the beginnings of these institutions before our eyes. Man is perhaps a hundred thousand years old, and it is pretty safe to assume that we will have to go back fifty thousand years in the life of the most advanced communities of today to find the beginnings of the legal and political phenomena which most writers assume began within a few thousand years of the Christian era. This organization is an entity existing apart from the community, and the members of the community, and the power exercised by that organization is called "political power."

The power of the community is necessarily exercised by individuals. Man naturally tends to follow a leader and be governed by somebody, and some men are natural leaders and able to exert authority over others. Such persons will inevitably come to the front and assume leadership, whether as a tribal chief, a king, a statesman or a political boss, and will work the mechanism of the political institution in whatever form it may occur. Their personal authority and power will vary according to the circumstances of the case. Modern development of political institutions has tended to diminish the power of individual leaders and transfer that power by some means or other to the members of the community. The exact relation which a leader bears to the unit he leads, and how much he exercises his own power, and how much the power of the mass, are matters of profound interest which will bear much analysis, for which space is wanting in this discussion.¹²

THE STATE.

§18. In this discussion the word "state" will be used as meaning a community of men existing from within, and exerting its power by its

¹² The following suggestion seems to be in point: Let the power of an individual be represented by X. It seems clear that the joint power of two individuals is greater than X plus X, and is perhaps not so great as X multiplied by X. One of the individuals, who is a leader of the other, exercises

his own power X, plus the power X of the other individual, plus the increased power gained by the associated effort. It seems probable also that as the increase in the number of individuals in a mass becomes greater, the increase in the massed power increases in proportion.

Factors Determining Conduct

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own inherent force.¹³ The word "state" is used in several different senses by the writers, to which, however, it is unnecessary to refer.¹⁴ A community, therefore, may or may not be a state, and the government of the state is a political organization, distinct from the state, and which may be changed or become extinct without affecting the life of the state which may be regarded as a living organism.¹⁵ A corporation is an organization but derives its powers and authority to organize from a superior power. It is therefore not a state.¹⁶ So, also, a municipality, as it exists in England and America, is a corporation, exercising its power by grant from the state. It is therefore not a state. Many volumes have been written on the nature and definition of the state, but this simple conception is sufficient for the present discussion.

HOW POLITICAL POWER DETERMINES CONDUCT.

§19. The political power of the state determines conduct in several ways, which will be through the exercise of the several branches of executive, judicial or legislative organs of the government.¹ The exercise of the political power may also be analyzed from another point of view, as follows: the power may be exercised (A) by prescribing a rule of conduct for the future, and affixing some penalty for its disobedience, (B) by prescribing a rule of conduct without imposing any penalty, (C) by affording redress for damage to interests without prescribing any rule to be followed by the organ of government affording such redress, in which case the organ of government may attempt to follow some rule in affording redress or may act without any such attempt.

¹³ Oppenheim, *Int. L.*, 2 ed. (1912), Vol. 1, 9, says that the conception of a community is wider than that of a state; that a state is a community but that every community is not a state.

¹⁴ The size of a state, its organization, its laws, or its customs are immaterial. An ancient village community or a family was just as truly a state as is the Empire of Great Britain today. For a further discussion of this point, see §42, post.

¹⁵ See §68, post, on continuity of a state.

¹⁶ See §48, post, on independent states.

¹ It is not necessary, for the purposes of the discussion, to observe this distribution of the state power. It is common to confine the discussion to the judicial power of the state, which, it is submitted, overlooks the fact that the executive may often afford redress for damage to an interest. The distinction is only necessary when we come to deal with the analysis of the various rules prevailing within a state, which is the applied philosophy of the municipal law and entirely outside the scope of our present discussion.

§19

Political Power

The state has very little power in barbaric communities, and there are no courts or legislatures. The life of the people flows in accustomed channels; needs are few and easily satisfied; there is little personal property and almost no thefts. Men are nearly of equal strength, and this equality of personal force prevents any undue exploitation of one by another. When, however, civilization increases, and wealth and material prosperity appear in a community, great inequality is created between the various individual members, inequality of physical strength and of mental power, and as a result, the weak are preyed upon by the strong. As this situation unfolds itself, there is an increasing need of the state exerting its power in order to protect men from each other, consequently developing civilization sees a development of courts, of legislatures and of the exercise of the power of the state. In modern civilization, furthermore, not only is there greater opportunity for the strong to plunder the weak, but the rewards of such plunder are greater, and the temptation correspondingly increased. As the old Hebrew proverb runs, if the state did not exist, the strong would destroy the weak. Failure of the power of the state is still with us. Early communities were powerless to enforce rules now easily enforced, and the rules that we cannot now enforce may be easily enforced in the future. The state finally curbed the robber baron and violent men of the community, and such crimes are negligible in a modern civilized community. We now have crimes of fraud prevailing, and the state is struggling as desperately to curb the promoters of fraud as the princes of the middle ages did to break the power of the robber baron.²

² The following table sets out the various factors determining human conduct:

Factors inherent in man

| | |
|------------------------------------|-----|
| Instinct..... | §7 |
| Reason..... | §8 |
| Habit..... | §9 |
| Attitude toward self-interest.... | §10 |
| Attitude toward interest of others | §11 |

Factors external to man

| | |
|--|-----|
| Facts and forces of nature..... | §12 |
| Factors proceeding from other men and present because of the gregariousness of man | |
| Apart from political power..... | §14 |
| Parental | |
| Marital | |
| Master and servant | |
| Force and intimidation from another individual | |

Societies and bodies of men

Ideas in the community, public opinion,

Custom

Ethics

From political power..... §15

| | | |
|------------------|-----------------|--|
| Executive | { In any one or | (A) Prescribing a rule of conduct and affixing a penalty |
| | | |
| Judicial | { all of which | (B) Prescribing a rule without a penalty |
| | | |
| Legislative..... | { | (C) Affording redress without prescribing any rule |
| | | |

Conduct as Determined by External Factors Other than Forces of Nature.

PRELIMINARY.

§20. Conduct as a fact has been defined and the external factors determining conduct, which are also facts, have been pointed out. What conclusion is to be reached when we consider them together? It will be assumed that the conception of conduct as determined by external factors is a jural conception, and the suspicion will be entertained that by analyzing that conception we shall be able to shed some light on the meaning and nature of law. It is first necessary to say a few more words about conduct. Conduct is to be distinguished from the description of the conduct, as conduct may take place without anyone ever describing it, and we may describe conduct which never has and probably never will occur. Conduct is past, present or future, and the description will vary in tense according to which it is applied, with this distinction: past and present conduct will be described as actual facts while the description of future conduct will be of a fact which may or may not occur as described.

RULES OF CONDUCT, DEFINITION OF, DISTINCTION BETWEEN AND EXTERNAL FACTORS.

§21. The factors influencing conduct result in more or less continuous conduct in some semblance of order, but the description of that conduct in terms of order, and the factors, are to be clearly distinguished. A rule of conduct is therefore simply the expression of a conscious mental effort to describe conduct historically, in the present tense, or as a source of information to members of the community of the conduct to be followed in the future. A rule of conduct is therefore a mental abstraction and cannot exist apart from reason. The description of future conduct may incorporate the idea of some external factor determining the conduct, or it may not. The conception of conduct will differ according to the point of view. If we look at conduct which has taken place in the past, we describe it in terms of history or habit. If we look at the actions of animals, we describe the action which they ordinarily follow as the habit of the animal. The same is true of man, only instead of using the word "habit" we use the word "conduct." A rule of conduct is nothing but a description of conduct which may be phrased either in the form of a description of past or present conduct, as all men turn to the

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Redress for Damage to an Interest

right when meeting a traveler on the highway, or in terms of the future, in which case the phrase will be—all men shall or will turn to the right.

REDRESS FOR DAMAGE TO AN INTEREST.

§22. The principal operation of the external factors determining conduct is to protect interests, and the protection of interests by these factors necessarily determines the conduct affecting the interest. How then are interests protected? My interest in an object may be affected by the conduct of another person, by a change in the object itself, and when that object is a person, the conduct of the object. My attitude towards such conduct will vary according to whether the effect produced is contrary to my liking. If the effect is sufficiently unpleasant, I will be filled with revenge or be moved to seek some redress either by way of compensation or by way of an attempt to restrain a repetition of the conduct. The extent to which I may have such redress will be determined by the ideas prevailing in the community as to the conduct which should be pursued under such circumstances, and those ideas will very largely correspond to the habitual conduct which has in fact been followed in the past, irrespective of what the origin of that conduct may be, and will be determined largely by what the other members of the community feel as to similar conduct affecting a like interest in themselves. The community will therefore regard redress as suitable on some occasions and as inappropriate in others. There will be a difference also in the amount and kind of redress under different circumstances. Conduct, therefore, affecting interests, leads to personal disputes, and the community will, from time to time, interest itself in settling such disputes.

There are three kinds of redress³ which, in the historical order in which they have generally supposed to have appeared, are as follows: (A) Self-help,⁴ which is the action taken by the person aggrieved, of his own volition, to secure revenge or satisfaction. (B) Arbitration,⁵ which is where the parties voluntarily submit the dispute to a third person or persons for decision. (C) Power of state which, is where the state by its proper official, generally judicial, pronounces judgment and enforces the order made against the parties by the power of the state. The latter two exhibit the common element of a third party

³ Redress contemplates—compensation for damage,—prevention.

see §540, §546, post.

⁴ As to self-help in international law

⁵ As to arbitration in international law see §545, post.

determining the dispute; in arbitration, however, the submission to the judgment is voluntary, whereas, in the case of a state officer, the process is compulsory and enforced by the state. It seems reasonable to suppose that self-help was first in order of development, arbitration next, and the power of the state last. There is, however, no absolute evidence, and we can only make a conjecture as to the historical order.

DISCUSSION OF CURRENT DEFINITIONS OF LAW.

§23. A number of different definitions of law have been collected in the note, which do not by any means include all which have been propounded.⁶ A sufficient number have been referred to, however, to indicate the general trend of opinion and demonstrate that the failure of the definitions arises from an insufficient analysis of the facts and an attempt to lay stress on one or more external factors to the exclusion of others. None of these definitions brings out the abstract nature of law as a pure mental conception, and all overlook the variety of factors which determine conduct.⁷ The popular view,

⁶ It is to be observed that there is an obscurity arising from the fact that in French and German there is no word corresponding to the English word "law." *Jus, droit* and *recht* equal right as well as law, so that the definitions of continental writers are to be used with great caution. See §29, post, on rights. See Manning, *Int. L.*, 2 ed. Amos. (1875) 1; 1 Westlake, *Int. L.*, 2 ed. (1910) 9; Wheaton, *Elements*, Dana's ed. (1866) 18, 19.

⁷ The definitions may be grouped as follows: (a) Definitions emphasizing the external power of the state, and excluding from the meaning conduct as determined by any other factor: "We may then say that law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power," 1 Oppenheim, *Int. L.*, 2 ed. (1912) 8. "Municipal law . . . is properly defined to be a rule of civil conduct prescribed by the supreme power in a state, commanding which is right and prohibiting what is wrong,"

Blackstone, *Comm. Introduction*, Sec. II. (b) Definitions emphasizing the conception of order in fact, in conduct or in the operations of nature, and ignoring the external factors determining such conduct: "Laws in their most general significance are the necessary relations arising from the nature of things," Montesquieu, "Spirit of Laws," Book I, 1. "Law in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational," Blackstone, *Comm.*, *Introduction*, Sec. II. "But laws, in their more confined sense . . . denote the rules not of action in general but of human action or conduct," *Ibid*, Sec. II. (c) Definitions bringing out the thought that a number of external factors are involved in the definition of law but failing to accurately note and distinguish them: "The most important outcome was embodied in Savigny's declaration that law is not the creation of the will of individuals, but the outcome of

§24

Author's Definition of Law

and that of English-speaking judges and lawyers, is that law describes the power of the state in determining conduct, which power may be exercised by prescribing a rule, with or without a sanction, or by affording redress according to the external factors operating in the community independently of any action by the legislature. This view, however, appears inaccurate upon careful analysis. We have two elements, the description of the conduct and the power of the state through various organizations enforcing the conduct so described. The power of the state is one element, the description of the conduct another. These elements may be separated, but the two are generally both designated by the term law. If we look at the conduct solely through the description, we include all conduct, past and present, which may be reduced to terms of order. If we consider solely the power of the state, we consider only future conduct and endeavor to state what the conduct may be expected to be.

AUTHOR'S DEFINITION OF LAW.

§24. Law as applied to human conduct in its broadest significance which will include all possible meanings, is the jural conception

the consciousness of the people, like their social history or their language. . . . The world is beginning to understand that law is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community," Hannis Taylor, "The Science of Jurisprudence," 22 Harv. Law. Rev. 243, 246. Kant's definition of law as "a totality of the conditions under which the free will of one man can be united with the free will of another in accordance with the general law of freedom," does not define law, but describes the state of affairs in which the conduct of the members of the community is so adjusted as to give the greatest freedom to each individual consistent with the greatest freedom of all other members of the community, a condition brought about, as he admits, by the observation of law. The proposed definition, there-

fore, begs the question by using the word attempted to be defined as a term of the definition. His provisional formula of precision is that "law is the delimitation of what may be done or may not be done without incurring (the risk of) a judgment, attachment, or a special use of force." With the aid of evocation, his definition reads: "law is the delimitation of what man and human groups have the liberty of doing or not doing without incurring (the risk of) a judgment, and attachment, or a special use of force." Henri Levy-Ullman, translated in 12 Amer. J. Int. Law, 438. This is merely an abstract formula standing for the conduct which is not determined by the external factors referred to. The words "attachment" and "judgment" refer only to special forms of the exercise of political power, and the term "special use of force" may refer to individual power or to some act of the state, as an arrest by a policeman.

of human conduct as influenced by external factors other than forces of nature. This definition extends to the conduct in fact and to the external factors influencing that conduct, and to the description of the conduct. This conception may be of (A) past, (B) present, (C) future conduct, and will be subject to slight variations accordingly.

(A) Past. The conduct which has in fact occurred in the past involves the question of what was the conduct and what external factors in fact determined that conduct. (B) Present. The conduct which is taking place at present involves the question—what is that conduct which is now taking place, and what factors are determining it? (C) Future. The future conduct involves the question—what conduct will take place in the future, and what factors will determine it? In answering this question, we have still greater uncertainty and are necessarily faced by the variation produced by the presence of the internal factors determining conduct, which will produce a disturbance of the effect of the external factors. In (A) and (B) there is a certainty as to both. The uncertainty as to factors arises entirely from the difficulty in fact of separating the influence of each factor from that of the others.

What is the jural conception of conduct, and how is it the pure mental conception? Conduct is a fact and when directly observed appears to us as a fact, and the mental impress of that fact, whatever the metaphysicians call it, corresponds to the fact and need not for the purposes of the present discussion be differentiated from it. Conduct directly observed is motion consisting of a number of continuous acts, just as the spectacle of a galloping horse is a fact which may be analyzed into several different elements. Conduct, therefore, may be analyzed, and a number of different instances of conduct of an individual or a number of individuals may be grouped together, each group forming a larger fact or set of facts. There comes a time in this process of grouping when the mind is unable to directly grasp the multitude of facts assembled and must resort to some abstract conception which will serve to represent the aggregate of them. We may directly observe two or three objects as a whole, but as the number of the objects increases, our capacity of direct apprehension will decrease according to the size of the objects and our facilities for observation. 1000 ants may be directly observed when 100,000 battleships will be beyond mental comprehension. The whole aggregate of human conduct, even in any given community, presents a mass of fact beyond possible enumeration and comprehension.

Suppose a three-masted ship is being driven through the water

§25

Nature of Law

by the wind and by steam power. The wind exerts its pressure on the sails of the masts, which are the external factors, and the engine and the helmsman are the internal factors determining the course of the ship. Now, the course of the ship through the water corresponds to the description of human conduct. After the ship has passed, the line the ship made through the water is merely an imaginary one. So also the course upon which it is about to enter is an imaginary one, but the action of the ship in going through the water is a fact. In the same way an individual's conduct, as we view it in the present, is a fact, but a description of that fact, as it was in the past or as it may be supposed to be in the future, is in each case a purely imaginary conception. We may therefore undertake to define the course of the ship through the water as determined by the sails, engine and pilot, forming a mental picture of the whole process of the ship going through the water. This will correspond to the conception of law, which conception may be colored by the point of view of the person forming the conception, and the principal elements of color in such cases are the external factors determining conduct. Thus, an ethical conception of conduct is a conception of conduct as determined by ethics; a religious conception of conduct is a similar idea as determined by religion. The legal philosopher, however, must take a view of conduct as a whole as determined by all external factors. He cannot confine himself to the external factor of the political power of the state; even the practical administration of the law is constantly confronted with the external factors of custom, habit, public opinion, etc.^a

NATURE OF LAW.

§25. Law, therefore, is a mental conception and an attempt to combine in one view two facts, conduct and factors, determining

^a The following algebraic formula may assist the reader in comprehending the distinction taken in the text. Let c = present conduct, c^1 = past conduct, c^2 = future conduct, d = description of the conduct, f^1 = external factors arising from presence of other men, apart from political power of the state, f^2 = external factor of political power. Expanding these symbols in the form of equations and letting the letter "x" represent law, we find the following propositions:

according to definition a in the note, $f^2 = x$; according to definition b in the note, $c + c^1 + c^2 + d = x$; according to definition c in the note, $f^1 + f^2 = x$. It is obvious, therefore, that the letter "x" has different values in the different equations. The definition proposed in the text appears in the form of the following equation: $c^1 + c + c^2 + f^1 + f^2 + d = x$, which includes all the other equations.

conduct. Law, therefore, has no motive, no activity, no purpose, is a pure philosophical speculation. The political power of the state is a fact, and the people of the state or the governors of the state may have a motive or purpose in prescribing a certain rule and affixing a sanction. The factor of the political power more nearly expresses the entire conception of law because the legislature may prescribe the conduct and apply the external factor by sanction, whether the conduct so prescribed is already determined by other external factors or not. Cases may occur where the other external factors are stronger than the power of the state, and then we have a case of law which is a dead letter. It is probable after all that the state can by its political power only add a more emphatic and forcible factor to the determination of conduct as already performed in a large part by the prevailing ideas and habits of the community. The most autocratic ruler is frequently unable to exert his power in opposition to the prejudices and habits of the people he governs.

Different suggestions have been made of the relation between the state and the law.⁹ Law, in one sense, is a rule of conduct enforced by the power of the state. If this is so, then there can be no law until there is a power of state to enforce it, and if, therefore, the law depends on the state, it is impossible to say that the state is a product of that which depends upon it. If, however, we define law as being merely the description of the habitual conduct of the members of the community, followed by them without the exertion of the power of the state, then the exertion of that power is independent of and has no connection with it, and is not a necessary element in law but an element which may or may not be present.

When it is said that an individual adjusts his conduct in conformity with a rule of conduct, we say something that rarely happens. He pursues his conduct according to his interest and instinct and the habits of the community around him, and is governed more or less by fear of redress. If it so happens that his conduct in connection with the conduct of other individuals conforms to a certain rule, this is a conception of which he is unaware. The average individual

⁹ "Originally law was not a product of the State but the State was a product of law. The right of the State to make law is based upon the rule of law that the State is competent to make law," 1 Oppenheim, *Int. L.*, 2 ed. (1912) 14n¹. "Law creates the state and the state creates law by a common and mutual

impulse; the two are born at an instant, are inseparable through life and must die together," Beale, *J. H.*, *Conflict of Laws*, Vol. 1, §101 (1916). "The state is an historical and political fact, the creator rather than a creature of law," Hershey, *Int. L.*, (1912) 115, and authorities cited.

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Nature of Law

is no more conscious of the elaborate jural conceptions of the philosopher than the ant is of the observations of the learned scientist who is watching his movements. If a rule describes conduct which individuals follow from an inward conviction of right, even though that conviction is shared by the majority of the members of the community who act upon the same impulse, the motive is inward. In such cases the individuals follow the rule from what may be termed inward compulsion or motive. Certain individuals, however, may not have the same ethical ideas as those possessed by the majority, and therefore may be willing to commit a breach of the rule of conduct in question, but dread of the moral condemnation of the other members of the community will compel such a one to obey the rule. This individual acts from external compulsion, to-wit, public opinion. This same rule of conduct may therefore appear to some individuals as merely descriptive of conduct always voluntarily followed without compulsion, and may appear to another individual as a hateful restriction, only to be complied with because of external compulsion, which may be either the opinion of the fellow members of the community or the political power of the state. A rule enforced by political authority frequently has the same aspect. People of highly-developed ethical ideas may pass their entire life without ever coming actually in contact with the state or the agents of the state, and be in entire ignorance of hundreds of criminal statutes which are complied with by them as a matter of second nature. It is obvious that in such case even rules have no imperative aspect to such a person. Does the rule cease to be a law as to that person? The question whether an imperative sanction by the state is annexed to positive law or common law is easily answered, and if that be the test of law, the test applies irrespective of the attitude of any individual mind toward it. If we reject any such formal descriptive quality, then we find that the existence or non-existence of any external compulsion of public opinion differs according to the attitude of the individual toward the conduct. If this test is applied, the same rule will be law to some and not looked on as law by others.

A rule of conduct, therefore, is a description of the conduct which individuals follow upon certain occasions, which rule may be voluntarily and unconsciously followed by some members of the community, and followed by others because of external compulsion of public opinion, and by still others solely because of the power of compulsion applied by the state. Furthermore, there may be conduct not habitual with members of the community generally but followed

Origin of Law

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only by a few of advanced ethical development. These differences of conduct are probably more extensive in modern times. If our definition includes, as it does, the external compulsion from the prevailing ideas of the community, which therefore may include ethical and religious conceptions, it seems to follow that law is properly used in referring to the ethical and religious law. We may take a step backward in our perspective view of human society and include all these external forces of compulsion, or we may separate them and consider some to the exclusion of others. The difficulty is that by attempting to include them all, the philosopher is frequently lost in the confusion of thought which is produced by the attempt to combine in the same chain of reasoning the conception of what ought to be with the conception of what is, or what is likely to be. This confusion was apparent in the thought of the ancient and medieval world,¹⁰ and it is only in recent years that advanced minds have been able to clearly distinguish these two conceptions.

ORIGIN OF LAW.

§26. Law, therefore, is a mental conception, a jural description of conduct, and consequently originates only in the mind of the thinker, just as the description of the habits of the lower animals is a mental conception of the scientist founded on his observation of their actions. The history of law and the origin of law is simply a history of the origin and development of the various ideas or jural conceptions of conduct which have been entertained by thinkers from time to time in the past. We must distinguish, therefore, origin of law and origin of conduct. The conduct is a fact, and different conduct appears at different times in different communities. The explanation of those differences in conduct, and why conduct is as it is, is no concern of the legal philosopher but lies within the attention of the sociologist. It is probable that the conduct of man was, in the first instance, adjusted by instinct to the surroundings in which he found himself. It is further likely that conduct developed gradually and was altered by the pressure of surrounding circumstances. One man, under certain facts, would find it necessary to vary slightly from the conduct which had theretofore obtained. Others, when faced with the same circumstances, would be likely to

¹⁰ Ethics and law were confused in early times. Thus, jurisprudence was defined by Ulpian as "the knowledge

of things human and divine, the science of the just and the unjust," Dig. 1, 1.10.

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Divisions of Law

imitate him, and so a slightly different line of conduct would be established. Gradually this conduct became more and more fixed. As the intellect of man developed, and he began to think more clearly about himself and the surrounding world, he began to consciously observe his conduct and endeavor to explain in some way why he habitually did a certain thing. Conduct became more complex as the community advanced in civilization, and many circumstances would occur so infrequently in the life of a particular individual that he would have no previous personal experience to guide him as to the conduct to be followed. Perhaps his neighbor would be as ignorant. It therefore became necessary that there should be some persons in the community who would be experts on matters of conduct and be able to inform others what should be done. It finally became necessary to have more accurate and permanent knowledge, and with the invention of the means of writing, we have the first appearance of what we call written law.

It is also likely that the period of civilization which we see in the Mesopotamian Valley and in India, antedating perhaps by some thousands of years the Christian era, is, after all, a community in a state of legal development far advanced beyond the state of affairs we are attempting to describe. The people who drew up the Code of Manu must indeed have reached an intellectual development far superior to that of the community in which it is possible to detect the first beginnings of orderly conduct and the germ of rules of conduct. It is apprehended, therefore, that it is a mistake to suppose that rules of conduct or law may be assigned as originating within the space of recorded history, or that the Twelve Tables of Rome or the Eastern Codes represent in any way the beginnings of law. At the time these codes were drawn up man must have passed over many centuries of legal development. When we compare the civilization of ancient India even with the development of the bushmen of Australia, we can easily see how far that Indian civilization had progressed from the original condition of man as he first existed in a savage state.

DIVISIONS OF LAW.

§27. Law, or rather jural conception of conduct, will be divided in three ways, according to which of three predominating elements are selected: (A) One division proceeds by classification of the objects whose conduct is involved. Thus personal law is law relating to the conduct of persons as determined by their personal status,

Justice

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tribal relationship, etc. Territorial law is law relating to the conduct of all persons within a certain territory. Corporation law is a law relating to the conduct of corporations. International law is law relating to the conduct of independent states. (B) Another classification proceeds by distinguishing the external factors determining the conduct in question. Thus, we have international law, without the factor of external political power; municipal law, with that factor; customary law, without the external factor of political power but determined by custom only; the law of morals, with the external factor of ethical ideas, etc. It sometimes happens, however, that the same conduct is determined by two or more external factors, in which case there will be a difficulty in separating the exact force which each has on the conduct in question. (C) Another division proceeds by classification of the interests, which are or are not protected by the various external factors. Thus, we have the law of real property, the law of crimes, etc. All these divisions cross each other at various points, and no one can be carried out to the exclusion of the others.

JUSTICE.

§28. When we say that a man has not secured justice or that he has been unjustly treated, we express the general idea in the community as to the redress which the man should have or as to the consequences which, in the opinion of the community, should follow his conduct. He has either had an interest of his damaged, or he has exerted himself and the attendant results of the exertion have not been realized because of some outward agency. There is a justice secured by the redress afforded by the political power in the community. There is also an idea of justice which does not always correspond to justice enforced by political power but which is entertained by the more advanced members of the community. Acts damaging interests will be differently regarded by the community and some will be considered as furnishing appropriate actions for redress of some kind, irrespective of the kind of redress; that is, calling for some kind of compensation or satisfaction which at first largely appears as individual. Modern ideas of redress are inappropriate for primitive communities largely because of the economic differences which exist. Immediate, personal satisfaction was generally sufficient for rude life. Ideas of justice, therefore, vary from time to time in history and in different communities. There is no universal standard of justice although the notion that there is such standard frequently appears in the writers.

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Rights

Inequalities of rank and social position, irrespective of the personal capacity of the holders of the superior position were accepted by men of the middle ages as a proper state of things. Changing ideas destroyed the political fabric of Europe under the conception that all men must have an equal opportunity, and the feeble and the weak should not be set over the others by artificial means. The removal of these conditions produced an opportunity for the full play of the natural inequality of man. Now, some philosophers say that this natural inequality of man must be allowed full scope, and every man must accept that inferiority in the social order caused by his own incapacity. If he cannot make a fortune he must be content to be poor; if he has not the brains of a great man, he must be a small one. He cannot complain of the consequences resulting from his own personal equation. A new philosophy has arisen—that all men must have equal status, the weak and the powerful together, and that no man should be permitted, by the exertion of superior force and power, to reap extra consequences in the way of gain. That is, a superior man cannot have the fruits of his superiority to himself but must share them with others so the community can take care of those who are below the average. The task of the statesmen is to reconcile these two opposing theories in such manner as will not deprive the superior man of his incentive and thus impede the progress of society, and, at the same time, prevent him from making too great acquisitions for himself at the expense of the weaker individuals.

RIGHTS.

§29. The word "right" is used in so many different senses that it has lost all possibility of accurate significance. The word is extensively employed in legal philosophy and in practice, without any regard to accuracy, however, and, as a consequence, generally serves to obscure rather than enlighten. Some of the various meanings of the word "right" have been pointed out by a recent author.¹¹

¹¹ Roscoe Pound classification in *International Journal of Ethics*, October, 1915, referred to and summarized by J. H. Beale, "Conflict of Laws," Vol. 1, §139.

(1) Right in the sense of an interest.
(2) Right as designating the chief means which the law adopts in

order to secure interests, that is, capacity of influencing the conduct of others.

(3) Right as a legal power.

(4) Right as a legal privilege.

(5) Right in the popular sense as meaning that which is just.

The ambiguity of the word renders it imperative for any writer on law, and particularly a writer on international law, to exactly indicate the sense in which he proposes to use the word and rigidly adhere to his definition. Any failure to do this raises a well-merited criticism of obscurity. The author has not found any writer on international law who has clearly indicated the sense in which he uses the word, and most of the writers appear entirely unconscious of any ambiguity in it at all. It is believed that it is entirely possible to discuss any branch of law, and particularly international law, without using the word "right." It will accordingly be discarded from the discussion, although reference will be made from time to time to its use by the writers.

Some of the various conceptions to which the word "right" is applied are as follows: (A) In popular and legal terminology as meaning that which is just. Since there is no absolute standard of justice, its use in this sense really means nothing except as describing that which a particular individual or community thinks is just. (B) As meaning an interest. There is no occasion to employ it in this connection, as the word "interest" sufficiently and more accurately describes the conception. (C) As meaning the potency of obtaining external assistance in protecting an interest, and may be limited to one or more of the external factors, and usually includes the potency of obtaining redress by the external factor of the power of the state. (D) As meaning that which is in fact the conduct determined by the external factors in any community, that is, custom of the people, generally a popular usage. (E) As meaning power to act as determined by external factors apart from the inherent power of the individual himself. When the external factor of the political power of the state is in view, the use is purely technical, and under it many different powers are distinguished, as power to make a will, power to appoint, power of an agent, power of attorney, etc. It is used in popular terminology in the same sense with particular reference to the external factor of political power. We have not enumerated all the various uses of the word, and the learned reader will easily be able, upon reflection, to think of other ambiguities.¹²

¹² The following quotation indicates the complete obscurity which generally attends the use of the word "right;" "In order to protect the individual members of human society from one another, and to make a just society possible, the Creator of man has im-

planted in his nature certain conceptions which we call rights, to which in every case obligations correspond," Woolsey, *Int. L.*, 6 ed. (1897). According to this, the Creator has implanted the conception, but it seems rather remote to say that the notion of right

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Summary

SUMMARY.

§30. The object of the first chapter is to form an idea of the definition and nature of law,¹ and as a starting point we assume that law has something to do with human conduct, and exclude from the discussion anything else with which it may have to do,² and direct our attention to the acts of human beings which are externally apparent, and to certain factors determining those acts.³

I have an interest in an object when I will be affected in any way by any change in the object, whether that change is produced by an outside agency or occurs in the object itself.⁴ Nearly all conduct may be referred to some interest, and our attention will be confined to the case where an interest is affected by human conduct, that is, our inquiry is human conduct, and nearly all human conduct affects an interest of some kind. An interest is protected when I am able to set in motion some external means of determining the conduct which is affecting the interest, and unprotected when I am helpless as to such external means.⁴ Two or more persons may have the same interest, and a body of individuals may have an interest in the object as such or in some outside objects. International law relates to the interests of certain bodies of men.⁴

Human conduct will be determined by a number of factors, which may be (A) internal or inherent in man himself, i. e., those proceeding from his characteristics as an animal and a rational being; which may be roughly classified under the headings of (a) instinct,⁵ (b) reason,⁶ (c) habit,⁷ (d) attitude towards self-interest,⁸ (e) attitude toward interest of others.⁹ (B) External, which are (a) those arising from the forces of nature,¹⁰ (b) those proceeding from other men.¹¹ The latter are present, because man is a gregarious animal, and will be absent when he is alone. Our attention will be confined to the latter external factors, which are of infinite variety, extending from the gentle pressure of love and friendship to intimidation and force, and from the collective action of a few individuals to the political power of the state.

Man has always lived in a community,¹² and every community has an organization of some kind¹² which exercises the power of

is of divine origin. Furthermore, the members of society are protected from each other by the external factors determining conduct, and these factors if they have any relation to rights, delimit those rights.

¹ See §1, ante. ² See §2, ante. ³ See §3, ante. ⁴ See §4, ante. ⁵ See §7 ante. ⁶ See §8, ante. ⁷ See §9, ante. ⁸ See §10, ante. ⁹ See §11, ante. ¹⁰ See §12, ante. ¹¹ See §13, ante. ¹² See §16, ante. ¹³ See §17, ante.

Summary

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that community. Every body of men having an organization exercising such power from within constitutes a state¹⁴ which by exercising its power over its members, to a greater or less extent determines their conduct.

The state may (A) prescribe a rule of conduct for the future and affix some penalty for its disobedience. (B) Prescribe a rule of conduct without imposing any penalty. (C) Afford redress for damage to interests without prescribing any rule to be followed by the organ of government affording such redress in which case the organ of government may attempt to follow some rule in affording redress or may act without any such attempt. The state had little power in barbaric communities and while that power has increased enormously with the progress of civilization, it seems to always be a little behind the actual needs of the community.¹ The conduct of a human being as thus determined by the action of these various external factors is a fact which in the past and present may be studied as such fact, just as the habits of animals are studied. The conduct is to be distinguished from the description of the conduct and from the factor determining it.² A rule of conduct is the expression of a conscious mental effort to describe conduct historically (A) in the present tense, (B) in the future tense as a source of information to the members of the community as to the conduct to be followed in the future.³ The proper operation of the external factors of conduct we are discussing is to protect interests, which is accomplished by affording to a greater or less extent redress for damage to an interest. The extent and nature of the redress will vary in different communities and in the same community at different times. The three modes of redress in the historical order in which they are generally supposed to have appeared are (A) self-help, (B) arbitration, (C) power of the state which is generally by judicial process.⁴

Law, as it relates to human conduct may be defined to be the jural conception of human conduct as determined by external factors other than the forces of nature. The definitions current in the books generally emphasize one external factor to the exclusion of the others, or fail to indicate whether the term is applied to the conduct or the factor or both. The only definition, therefore, which will include all possible meanings must include conduct and all factors. The definition must further emphasize that law is a pure conception, a product of pure reason and has no existence in fact unless the defini-

¹⁴ See §18, ante.

² See §20, ante.

⁴ See §22, ante.

¹ See §19, ante.

³ See §21, ante.

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tion is narrowed to one only of the factors as is the custom with English speaking judges and practicing lawyers who use the word "law" exclusively to mean the rule of conduct as described by the political power of the state, irrespective of whether it is in fact enforced by that political power or not. This meaning of law is sufficiently clear and corresponds very closely to the popular meaning of the word. The legal philosopher, however, cannot confine himself to this narrow conception, as by so doing he will fail to grasp the external factors other than the power of the state determining conduct, which factors cannot be left out of view by the lawyer, the jurist or the statesman. The controversy over the meaning of the word "law" simply amounts to this: all agree that it embodies the conception of order, but as limited to order in human conduct there is a difference in opinion as to which one or more of the external factors is embraced in the meaning of the word, a difference of opinion so acute that it can only be removed by taking the word as extending to all the external factors.⁵

It is not possible, furthermore, to accurately separate the effect of the various external factors. They may all unite in determining the same conduct or may work at cross-purposes. The same external factor may have different aspects to different individuals, some being more impressed by one than another, and many people have a very dim realization of any of these external factors at all. Such persons conform in their conduct, as determined by their inherent characteristics and instincts, to that determined by the external factors in the community.⁶

Law then has no origin or existence outside the mind of the thinker although conduct and the external factors are facts which have existed and exist in the world today.⁷ Law is susceptible of various divisions, and the one which illustrates the subject of our discussion is that between conduct as determined by the external political power of the state and conduct not so determined. The only instance of the latter is that of the conduct of independent states with which international law is concerned.⁸ We must furthermore remember that there is no general or absolute standard of justice although many writers make the mistake of supposing that there is. Consequently, any supposed standard of justice is merely an individual opinion or the opinion of a group of individuals, therefore not susceptible of general application.⁹ The word "right" has been used in so many

⁵ See §24, ante.

⁶ See §25, ante.

⁷ See §28, ante.

⁸ See §26, ante.

⁹ See §27, ante.

different senses that it is entirely useless in any accurate discussion of law, and will therefore be discarded. This can be done quite easily in international law where the words "power" and "interest" will more accurately and with sufficient clearness indicate all the necessary meaning in which the word "right" is used by the writers.

In practice, English-speaking judges and lawyers use the word "right" in a strictly technical significance, which is sufficiently clear to them but when disassociated from the practical atmosphere of the courts has no value whatever.

There is a further ambiguity in this use of the word arising from the circumstance that "droit" and "recht" in French and German¹⁰ must serve for the conception embraced in the word "law" in English, because there is no other word existing in these languages corresponding to the word law.¹¹

¹⁰ See §23n⁴, ante. ¹¹ See §29, ante.

CHAPTER 2.

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PRELIMINARY.

§40. The peculiar nature of an independent state,¹ and the great difference between it and an individual, necessitates a rather more detailed examination of facts which are so obvious in municipal life that they are taken for granted by the lawyer and layman.²

¹ It has already been pointed out that international law is a conception of the conduct of independent states. See §4, ante.

² Thus, in municipal law, the animal man is the principal fact. Knowledge of his general characteristics and attri-

butes is so universal and so largely a matter of daily experience as to be almost unconscious. It is only when our attention is directed to the subject that we realize that the conception of man as a fact is absolutely essential to the understanding of municipal law.

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Nation Defined

This chapter, therefore, will be devoted to a discussion of the organisms we call states, their origin, extinction, manner of conduct, and characteristics; the relation between them and the nature of the jurisdiction they exercise.³

NATION DEFINED.

§41. A nation is an aggregation of people having a community of instinct and generally a common origin, and a greater or less community of language, law and custom, who may or may not occupy a fixed territory on the surface of the earth or have a national political organization. A few definitions are collected in the note.⁴ The word "nation" is a translation of the Roman word "gens," and was fixed in international usage when bodies of men were more generally classified by tribal affinity than as they are to day by local contiguity.⁵

³ The writers generally fail to emphasize this distinction between fact and law. Lorimer, *Inst.* (1883-4) Vol. 1, 91-219 discusses the various facts of international life under what he describes as the doctrine of recognition, making it appear as if the facts did not exist apart from recognition, which, it is apprehended, is a confusion in thought. Confer, however, Twiss, *L. of Nations, Peace*, 2 ed. (1884) 16, "Incidents and Modifications of International Life."

⁴ "A 'people' is a large number of human beings, united together by a common language and by similar customs and opinions, resulting usually from common ancestry, religion and historical circumstances;" Holland, *Jurisprudence*, (1908) 10 ed. 43. "The term Nation, in its primary and etymological sense, denotes a race of men, in other words, an aggregate body of persons, exceeding a single family, who are connected by the ties of a common lineage, and perhaps by a common language. In a secondary and political sense the term Nation signifies a society of persons occupying a common territory, and united under a common government, in other words, a

Commonwealth or State;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 1. "A nation, as the word is used in the term 'law of nations,' and generally in the language of international law, means a state considered with reference to the persons composing it;" 1 Westlake, *Int. L.*, 2 ed. (1910) 3, 4. "A nation is an organized community within a certain territory; or, in other words, there must be a place where its sole sovereignty is exercised;" Woolsey, *Int. L.*, 6 ed. (1897) 62. There is no necessity of a fixed location. This common fact in modern times has led to the erroneous belief that it is indispensable.

⁵ Thus, the Jews are a nation scattered over the world, without occupying a fixed territory, and are subject to the government of many different states. The Poles occupy a fixed portion of the world but their territory has been divided among several states. The ancient Servian nation, after losing its independence and suffering many vicissitudes, has only in part attained an independent state existence, and a portion of that nation is still subject to Austria and the Ottoman Porte. On the other hand, the French, English

The State

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The State.DEFINITION OF A STATE.

§42. A state is a community of men exerting its power as an organization by its own inherent force, and not by a delegation of power from any other organization.⁶ It is a living organism and corresponds in many particulars to the characteristics of animal life. Some definitions are appended in the note.⁷ The states existing in the

and German peoples occupy a certain territory and have state governments coterminous with these boundaries. Nationality means the quality of being national and describes the connection a particular individual has with a certain nation of whose peculiarities he partakes. See §430, et seq. post, as to membership in the community.

⁶ See §19, ante, for a discussion of the state.

⁷ "A numerous society united by a common sense of right and mutual participation in advantages," Cicero, de Rep., I, i, §25. For a discussion of Cicero's definition, see Twiss, L. of Nations, Peace, 2 ed. (1884) 3; Wheaton, Elements, Dana's ed. (1865) 30. "A perfect society of free men united for the promotion of right and the common advantage;" Grotius, Belli. ac. Pacis (1625) I, I., XIV, 2. It is not essential to the idea of a state that it be united for the promotion of right. "A 'State' is a numerous assemblage of human beings generally occupying a certain territory, amongst whom the will of the majority, or of an ascertained class of persons, is by the strength of such majority, or class, made to prevail against any one of their number who oppose it;" Holland, Jurisprudence, 10 ed. (1908) 44. "A state is a permanent association of people politically organized upon definite territory and habitually obeying the same autonomous government;" Her-

shey, Int. L., (1912) 93. Objection that it confines the state to a fixed territory. "A State is a body politic, or society of men united together for mutual advantage and safety;" 1 Halleck, Int. L., 4 ed. (1908) 69. "A state may be defined as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey;" Lawrence, Int. Law, 5 ed. (1913) 55. "The State is . . . seen to be an aggregate of human beings (the number of whom cannot be definitely assigned, though both superior and inferior limits no doubt exist), having definite relations to territory, to social existence, to government, and to certain moral ideas, of which the ideas of past and a future, and of a national unity, are the most dominant and unmistakable;" Manning, Int. L., 2 ed. Amos. (1875) 92. "A State proper—in contradistinction to so-called Colonial States—is in existence when a people is settled in a country under its own Sovereign Government;" that the conditions for the existence of a state are a people, a country, a government, a sovereign government; 1 Oppenheim, Int. L., 2 ed. (1912) 108. "A Civil State is a compound Moral Person, whose will being united and tied together by those covenants which before passed amongst the multitude, is deemed the will of all,

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Characteristics of a State

world are sufficiently tangible and definite for all purposes of the study of international law except in a few instances. A state may be coterminous with a nation or it may be coterminous with two or more nations. A state is a fact, the characteristics of which are to be learned by observation. The word "state" is also used to designate the government of a state and few writers on international law make any distinction in the meaning.⁸ Indeed, most of them use it interchangeably without realizing the ambiguity involved. It will be used in this discussion as meaning the community apart from the government.

CHARACTERISTICS OF A STATE.

§43. Size, origin, form of government, and goodness or badness of the people of a state, as well as permanency and definite territory

to the end that it may use and apply the strength and riches of private persons towards maintaining the common peace and security," Puffendorf, translated by Twiss, *L. of Nations, Peace*, (2 ed. 1884) 4, 5. "But for all purposes of International Law, a State . . . may be defined to be, a people permanently occupying a fixed territory . . . , bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all International relations with the other communities of the globe;" 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 81. "A State may be defined as the union of a determinable territory with a determinable people combined politically, that people enjoying independence from habitual external human control;" Walker, *Man. Int. L.*, (1895) 1. "Cicero, and after him, the modern public jurists, define a State to be a body political, or society of men, united together for the purpose of promoting their mutual safety and advantage by

their combined strength;" Wheaton, *Elements*, Dana's ed. (1866) 29, 30. "A state is a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice by self-imposed law;" Woolsey, *Int. L.*, 6 ed. (1897) 34. Westake, *Int. L.*, 2 ed. (1910) Vol. 1, 1, 2, 3, says that the word "state" is used to designate three different bodies: (1) States of international law as France, United States, etc. (2) States supreme over their subjects but not states of international law, as Austria or Hungary. (3) States not even entirely supreme over their subjects, as particular states of the United States, New South Wales, Victoria, etc., which, he says, have the title "State" by way of compliment. He entirely misunderstands the American situation. "A body politic or society of men who seek their well-being and common advantage in the combination of their forces;" Vattel, (1758) Chitty's Trans. Book I, §1. See definitions collected 1 Moore, *Dig. of Int. L.*, (1906) 14 et seq.; Holland, *Jurisprudence*, 10 ed. (1908) 45.

⁸ See §55, post, for the distinction between a state and its government,

are all unnecessary to the idea of a state.⁹ An organization of men for a brief period is a state. A fact is none the less a fact because it is fleeting. The difficulty is that most writers confuse the idea of a state as such with the idea of an international person as it exists today in international life, and thus reach the conclusion that an organization is not a state unless it is an international person, whereas, in truth, some states are international persons and some are not.¹⁰

A mob does not constitute a state because it has no organization, although it may exercise its inherent forces from within. The existence of a legislature and courts is not necessary to the conception of a state as the form of government is immaterial. An absolute potentate may govern a state. The general tendency is to incorporate into the definition of a state certain attributes usually present. It promotes clear thought to reduce the idea to its simplest terms and then recognize a great many different varieties all having the same characteristics.¹¹

⁹ Manning, *Int. L.*, 2 ed. Amos. (1875) 92, states that the change from monarchical to modern forms of government has strikingly altered the conception entertained of a state. If a correct idea of a state had been formed, no change in it would be caused by changes in an immaterial factor, to-wit, the form of government. "Thus, a state may place itself under any form of government that it wishes and may frame its social institutions upon any model;" Hall, *Int. Law*, 6 ed. (1909) 43. This is inaccurate. The people of a state place themselves under a government. More proper to say the people adopt a form of government. See §56, post, as to form of government of a state. Confer Wheaton, *Elements*, Dana's ed. (1866) 30:

(1) A people permanently organized for political purposes, i. e.—the maintenance of law, liberty, and a relative quality of opportunity as conditions necessary for individual and social well-being. (2) A definite territory containing inhabitants sufficiently civilized and numerous and resources sufficient to insure a certain degree of

permanence, stability and independence. (3) A certain degree of sovereignty, of autonomy and independence (i. e. relative freedom from a higher or an external control) and a government which is habitually obeyed;" Hershey, *Int. L.*, (1912) 93, 94.

¹⁰ See §60, post, on personality of a state.

¹¹ Thus, when Wilson, *Int. L.*, (1910) 23, 22, distinguishes a state from a private commercial company on the ground that one is for private ends and the other for public, he overlooks the point. Autocracies exist for the private ends of the ruler as much as any company. The distinction is in the source of the power, whether from within or from above by grant from a superior political power. There is objection to the notion, apparently advanced by Burke, quoted and adopted by Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 1, 204, 205, that the notion of a state necessarily includes the idea of extent in time, and therefore the individuals and organizations existing at a particular moment of time do not constitute

§44

State Distinguished from Nation

The oriental tax-gathering empire, which has caused so much difficulty to many writers, is simply an instance of a state exercising external control over a large number of small local village communities or organizations which are nothing but states, and practically absorbing all the foreign relations of such states. It is more like a confederacy than anything else. The notion has been advanced that a body of pirates is not a state because of the fact that it is not recognized by the world and is organized for evil purposes.¹² This, it is submitted, is an error. Pirates are an organization of men having the power from nowhere but within, and, although not recognized, they bear all the marks of a state. Many volumes have been written on the state, and a great difference of opinion has developed as to what the conception of a state is, which controversy entirely overlooks the circumstance that a state is an existing object, just as a protoplasm, and upon examination will be found to be mostly a discussion of what the state ought or ought not to do, which involves the ambiguity usually attendant on the use of the word "ought."

A STATE DISTINGUISHED FROM A NATION.

§44. A state, therefore, is to be distinguished from a nation in that the former is a political society existing entirely apart from and independently of the nationality or characteristics of the individuals who compose it; whereas a nation is a collective body of people frequently without any common political government.¹³

a state but only the individuals as they have existed in the past, as the author says: "One generation does not constitute a state." This notion is more nearly true of a nation than it is of a state because a nation must have ties extending over a period of time. It would not be possible to constitute a nation without the existence of several generations of people giving an opportunity for the acquisition of a common language, etc.

¹² Woolsey, *Int. L.*, 6 ed. (1897) 34, says pirates are no state, being an association for temporary purposes and designing to act injuriously by its very existence. "A state might arise out of a nest of pirates, but would not begin to be a state until it laid aside

its piratical character." See §286, et seq. post, as to piracy, and Wheaton, *Elements*, Dana's ed. (1866) 30.

¹³ Some writers are of the opinion that the words state and nation are synonymous. E. g.—1 Moore, *Dig. of Int. L.*, (1906), 14. "Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength." Vattel, (1758) *Chitty's Trans. Prel.*, §1. Twiss, *L. of Nations, Peace*, (2 ed. 1884) 2, speaks of the elements which impart to a state the character of a nation and seems to imperfectly apprehend the distinction. See definitions, n. 7 ante. Some writers accurately distinguish a

State Distinguished from Nation

§44

The state appeared in early times universally in the form of an organization of a family or tribe, and the nation and state were practically coterminous. The exclusiveness and strength of the tribal relationship has been weakened by modern civilization, and the state is now so frequently composed of people of different nationalities united together simply because of their dwelling together in a common territory that the meaning of the word "state" and "nation" must be kept clearly separate.¹⁴ The use of the word "nation" as meaning a people of common descent occupying a fixed territory and existing as an organized body politic, although accurately describing a state of facts which perhaps generally exists, and frequently used by writers in international law, must be discarded in the interests of precision and clear thinking.¹⁵ Modern thought seems to be demanding that every nation shall have a fixed portion of the earth's surface for its occupation and be permitted to form a government of its own.¹ Such an arrangement, if universal, would probably tend to remove some existing causes of international friction. It is not proper, however, to anticipate the ideal by forcing a definition to describe it, rather than the reality as it exists in the world at the present time.

The feeling of nationality is a survival of the ancient tribal exclusiveness and is one of the greatest obstacles to the further development of the international world that there is today. This fierce spirit of national exclusiveness insists upon a certain community of people having their own government over a certain area of the earth, without regard to the fact that some other community may be equally as well accommodated by having their government on the same territory. It also leads to a strong desire on the part of each of such states to increase their acquisitions at the expense of their neighbors.

nation and a state; Holland, *Jurisprudence*, 10 ed. (1908) 44; 1 Halleck, *Int. L.*, 4 ed. (1908) 70; Lawrence, *Int. Law*, 5 ed. (1913) 35n. "A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority;" Wheaton, *Elements*, Dana's ed. (1866) 30, 31.

¹⁴ See §432, post, on change in state membership.

¹⁵ See §96, et seq. post, on jurisdiction.

¹ Hershey, *Int. L.*, (1912) 95n⁷, says that nations have an inherent right to

form themselves into states. This, it is apprehended, is a misuse of the word "right." More accurately expressed, the thought is that the unquestioned power of every nation to exist as an independent state should not be impaired by the action of any political power external to the nation. Woolsey, *Int. L.*, 6 ed. (1897) 64, however, is of the opinion that where two nationalities are united in one state, no outside state of the same nationality has a so-called right to force itself into the union.

§45

Classification of States

Now, the development of the modern world is towards the principle of a political community based entirely on the principle of contiguity, that is composed of the people living together on the same territory. It has been demonstrated by the example of some modern states that such a government is feasible and practicable even though the persons living together are of different nationalities provided they have about the same amount of civilization and education. The probability is that modern civilization has now seen the final culmination of the struggle for popular liberty and that absolute governments will practically disappear from the world. The closing of every such movement is always the precursor of the beginning of another, which probably is in the direction of fixed political units, each having a certain definite territory and exercising its powers of government entirely without regard to and irrespective of the religion, nationality or other differences of the people who compose it.

Classification of States.

PRELIMINARY.

§45. It is now necessary to distinguish and classify the bodies called states in order that we may separate independent states, which as has already been hinted on several occasions, are the bodies whose conduct is regulated by international law. Numerous divisions may be adopted and have been propounded from time to time.² It is only necessary for us to make those distinctions which are material in the study of international law. The classification usually found in the writers confuses governments and states, a confusion which proceeds from the double meaning of the word "state," which is generally imperfectly realized.³

² The following table shows the classification adopted:

| | |
|--|---------|
| Fixed states..... | §46 |
| Moving states..... | §47 |
| Independent states..... | §48 |
| Belligerent and insurgent states..... | §49 |
| Dependent states..... | §§50-51 |
| Relation between independent and dependent states..... | §52 |
| Neutralized states..... | §53 |

³ Hershey, *Int. L.*, (1912) 99, says

that from the standpoint of international law states may be doubly classified into sovereign and part-sovereign, and into simple, composite and dependent. Simple and composite, however, relate to the form of government. See §56, post. The learned professor no doubt slipped into this faulty analysis because of the ambiguity of the use of the word "state" as meaning the government of the state.

Classification of States

§§46, 47, 48

FIXED STATES.

§46. A fixed state is one exercising its power continuously over the same portion of the earth's surface.⁴ This is the type of modern state with which we are concerned and is self-evident.

MOVING STATES.

§47. Moving states are those which are continually roving from place to place and have no fixed political habitat. Here the same ground may in a short period of time be successively occupied and subject to the power of several different states.⁵ There are many organizations, as Indian tribes of North America and wandering hordes of primitive tribes, which are denied recognition as a state by many writers. This is apprehended to be an error. They exert their power by their own inherent force, and the circumstance that they have no fixed territorial jurisdiction and are without civilization, may exclude them from the bodies recognizing each other as bound by international law,⁶ but does not make them any less states.⁷

INDEPENDENT STATES.

§48. Some states are independent of external political power, as Great Britain, France, United States of America. The political independence of a state is a fact to be learned by observation, and may be defined as the condition of a state which has no external superior, that is, the state may exercise its inherent force without any external superior constraint.⁸ Every such independent state

⁴ See §98, post, as to territorial jurisdiction. See §§211, 212, post, as to territory of a state. Hall, *Int. Law* 6 ed. (1909) 19, says fixed territory is a distinct requirement (of being subject to law) which results from the circumstance that all communities in Europe became fixed by the Middle Ages, and such communities, therefore, were the only ones dealt with. The fact that these are the only bodies dealt with does not preclude the possibility of the existence of the others which possibility must be recognized in the analysis. Lawrence, *Int. Law*, 5 ed. (1913) 58, says a state must have a fixed territory before admission into the

family of nations. See §80, post, on membership in the family of nations.

⁵ See §98, post, on territorial jurisdiction.

⁶ See §80, post, on membership in the family of nations.

⁷ See §112, post, on scope of international law.

⁸ "The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control;" Hall, *Int. Law* 6 ed. (1909) 17. This, however, embodies the objectionable notion of permanence and defined territory. See

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Independent States

is in a measure dependent on other independent states and subject to more or less constraint when any of them set in motion the external factors determining independent state conduct.⁹ Theoretical or absolute independence can only be predicated of a state existing alone in the world.¹⁰ Independence is used in this treatise to mean only independence of external political power.

The word "sovereignty" is ambiguous. It seems to be used to mean the independence and the inherent power of a state, as well as being used in other connections.¹¹ The difficulty is that it is used to designate so many different attributes of a state that all possibility of accurate sense has been lost. We propose to waste no time in chasing shadows, and will therefore discard the word entirely. The word "independence" sufficiently indicates every idea embraced in the use of sovereignty necessary to be known in the study of international law.

§42, ante, on definition of a state. "A sovereign (independent) State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers;" Wheaton, *Elements*, Dana's ed. (1866) 52. He has, however, previously distinguished a state from a nation. See §44, n¹³ ante. It is therefore improper to speak of the independence of a nation because a nation may be divided into several states or may form part of a state which is subject to another. See §44, ante, on the distinction between a state and a nation.

⁹ For a definition of see §105 post. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 9, says that independence is the fundamental element which imparts to a state the character of a nation. "Independence may be defined as the right of a state to manage all its affairs whether external or internal without control from other states;" Lawrence, *Int. Law*, 5 ed. (1913) 119.

¹⁰ Lorimer, *Inst.* (1883-4) 1, 139 et seq., and Twiss, *L. of Nations, Peace*, 2 ed. (1884) 11, point out impossibility of absolute independence existing in fact.

Lorimer says "A State is entitled to be regarded as independent if it is not de jure dependent upon any other state for its freedom of political action." See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 180; Lawrence, *Int. Law*, 5 ed. (1913) 121.

¹¹ The term introduced into political science by Bodin in 1577. See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 111. "Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all around, within and without the borders of the country;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 109. Many writers take the correct view of the impossibility of framing an accurate definition of sovereignty. The conflicting views are well sketched in 1 Oppenheim, *Int. L.*, 2 ed. (1912) 111-115. Manning, *Int. L.*, 2 ed. Amos. (1875) 95, 96, points out that the terms "sovereignty" and "independence" are too vague to be of practical use in political discussion, but are useful because of the weight they give (1) to the principle that no state is entitled

Corporations are clearly to be distinguished from independent states, being bodies organized by grant from the political power of the state. It would not be necessary to mention this point were it not for the numerous large corporations created by France, Great Britain and Holland for the purposes of trade and government in the

to interfere in the internal affairs of another state; (2) to the principle that every state is, for the purposes of political intercourse and ceremonial consideration the equal of every other state. While these useful principles may have in the past been partly supported by this vague notion, there does not seem to be any necessity of further thinking obscurely on the subject. The word "independence," however, is perfectly clear. The following writers adhere to the conception of sovereignty: Vattel, (1758) Chitty's Trans. Book 1 §§1, 4; 1 Halleck, Int. L., 4 ed. (1908) 10, where he says "A sovereign State may therefore be defined to be any nation or people organized into a body politic and exercising the rights of self-government." Westlake, Int. L., 2 ed. (1910) Vol. 1, 21, retains the conception and says that the different uses of the word "sovereign" are sufficiently analogous not to offend against propriety of speech. International law, however, needs something more in the way of accuracy than mere propriety, and the mere statement that it does not offend is not sufficient without showing how the conception can be clearly applied. Twiss, L. of Nations, Peace, 2 ed. (1884) 23, 24, distinguishes "sovereignty" from "independence," instancing the member states of United States of America which are regarded as sovereign states although dependent. This is only another instance of the ambiguity of the word "sovereign." "The term sovereign power is sometimes used by publicists in a metaphorical sense to denote the entire state or nation

viewed from without;" Twiss, L. of Nations, Peace, 2 ed. (1884) 16. Halleck, Int. L., 4 ed. (1908) Vol. 1, 72, says that the sovereignty of a state is not necessarily destroyed by a nominal obedience to others, citing the case of the free state of Cracow as constituted by the congress of Vienna in 1815. "Every nation that governs itself, under what form soever, without dependence on any foreign power, is a Sovereign State," Vattel (1758) Chitty's Trans. Book 1, §4. For etymology of sovereignty and suzerainty, see 1 Westlake, Int. L., 2 ed. (1910) 220n.¹ There can be no such thing as a semi-sovereign state, using the word sovereign as meaning a state completely independent of external control. Halleck, Int. L., 4 ed. (1908) Vol. 1, 79, distinguishes semi-sovereign states. Twiss, L. of Nations, Peace, 2 ed. (1884) 24, 25, points out the solecism of the phrase "semi-sovereign." Independence is an absolute freedom from control, and cannot therefore exist in degrees. The dependence which is the opposite of independence may be greater or less, according to the extent of the restraints which exist. Some writers distinguish part sovereign, Hershey, Int. L., (1912) 99; others full and not full sovereign states, 1 Oppenheim, Int. L., 2 ed. (1912) 107; Lawrence, Int. Law, 5 ed. (1913) 61. Confer "Sovereignty in English Law," Frederick Pollock, 8 Har. Law Rev. 243. "Notes on Sovereignty in a State," Robert Lansing, 1 Amer. J. Int. Law, 105 et seq. and 297 et seq.

east and in the colonies. Some of these corporations exercised great powers of government. They were, however, dependent upon the political power of the state which created them.¹³

BELLIGERENT AND INSURGENT STATES.

§49. Internal dissensions in a state affecting the government will tend to disturb the international relations of the state since the government is the organ for those relations. Among autocratic governments any revolt is suppressed with an iron hand and is generally an attempt to subvert the existing dynasty and establish a new one. Controversies of this kind were frequent in western Europe, and the neighboring potentates, when such a revolt arose, took such attitude as best suited their own interests, rendering assistance to the usurper or recognizing him accordingly.¹³ A revolt among the people in establishment of popular rights was regarded as being especially dangerous and common cause was generally made in such a case.¹⁴ With the rise of democracies and limited governments, the voice of the people was heard with different effect, the stigma of treason became less applicable, and the power of the people to govern themselves and choose their own government could not be denied. A body of people revolting from the parent state became of importance in international relations and consequently presented a state of

¹³ See §18, ante, as to distinction between a corporation and a state. British East India Co., referred to 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 199, was chartered to exercise many of the functions of a state outside the jurisdiction and within the jurisdiction of no state, or rather in that of states too feeble to resent the intrusion on their independence. Other companies of this kind were the East India Company; Royal Niger Co., extinguished by act of 62 and 63 Vict., c. 43; British East Africa Co.; North Borneo Co.: 1 Halleck, *Int. L.*, 4 ed. (1908) 71; Wheaton, *Elements*, Dana's ed. (1866) 30. See §613, post, as to powers of government exercised by these corporations. British South Africa Co., discussed at length by Lawrence, *Int. Law*, 5 ed (1913) 73 et seq. It is difficult, however, to see what bearing the attitude of the native mind toward

the corporation has on its international status. Any hardy individual can collect a few retainers, penetrate a new country, and even with a few rusty rifles thoroughly terrorize the natives and appear to them as an embodiment of some supernatural power. Even a college freshman would not have the hardihood to argue that such individuals were an international person or a supernatural being.

¹⁴ E. g.—The joint action against the French Revolution.

¹⁵ It is necessary to distinguish (a) revolt against government, which revolt, if successful, changes the government and leaves the state organism unchanged. E. g.—French Revolution. (b) Revolution against the government involving a new state appearing beside the old one. E. g.—13 British Colonies of North America.

facts of which account must be taken by neighboring independent states.

The principle was not realized until the opening of the nineteenth century. The revolts in western Europe, of the Swiss Cantons, and the United Provinces,¹⁵ while having all the elements of a popular uprising, do not seem to have presented any question of belligerency. The revolt of the thirteen British Colonies in North America, followed by the revolt of the Spanish Colonies in South America, of Greece, Belgium, and others since, have presented facts which call for a new vocabulary in the science of international law.¹⁶

The term "belligerent" had long been used in international law to describe independent states engaged in war,¹ and such states² were engaged in international violence which was more or less regulated by certain principles called the laws of war.³ The revolting community, by making itself felt in international life, acquired the status of an independent state engaged in war,⁴ and therefore was described as a belligerent state or community. The international status of the community is only for the war and does not necessarily extend to other international functions which only attach when the revolution is successful.

The recognition of such a body as a belligerent⁵ will bring it within the international horizon, and accordingly subject to the external factors determining independent state conduct. The recognizing state may therefore expect such a body to conduct itself accordingly, and the desire of the latter for independent state life will powerfully impel a recognition of those factors. If they are regarded only as

¹⁵ Woo'sy, *Int. L.*, 6 ed. (1897) 292, makes the point that the revolt of the Low Countries (in discussing the recognition of the Confederate States of America) was not an analogous case as they were states having special charters, not connected with Spain except so far as the King of Spain was their suzerain. Is this distinction valid? Does it make any difference what the nature of the tie is between the revolting state and its parent state? In either case the dependent state has been shut off from international life, and by a successful revolt comes into that area.

¹⁶ For history of status of belliger-

ency, see Hershey, *Int. L.*, (1912) 121.

¹ "When states engage in armed conflict, those thus engaged are called 'belligerents.' The laws of war and neutrality come into operation;" Wilson, *Int. L.*, (1910) 39.

² See §606 et seq., post, on parties to a war.

³ See §734 et seq., post, on the laws of war, and Chap. 13 on the conduct of hostilities.

⁴ See §603, post, on distinction between municipal and international violence.

⁵ See §84, post, on recognition of belligerency.

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Dependent States

traitors the outside independent state will, as to interests within the political control of the revolting body, be compelled to look to the parent state, which will in fact be unable to fulfill its international obligations as to the interests existing within that territory.⁶

A distinction has been drawn as to insurgency. Insurgency exists when a number of individuals in a community deny the supremacy of the state government and exert such force that the government is unable for a time to suppress them. A proper distinction between that and a belligerency seems to lie in the circumstances that the belligerency makes it felt in international life, whereas, the insurgency is only a municipal affair. This distinction has, however, not been drawn by the writers.⁷

DEPENDENT STATES.

§50. A dependent state is a state which is subject to external superior political control which can only be by some other state.⁸ An independent state may therefore become dependent, and it is

⁶ Twiss, *L. of Nations, Peace*, 2 ed. (1884) 21, says that if the revolution fails the status quo revives, and if the revolution proves successful the government de facto succeeds to the rights and obligations of its predecessor in all international matters, and intercourse is resumed with other nations on that understanding. How does this bear on the distinction between a revolution succeeding by breaking away from the former state and leaving it remain in international life and one which is merely a change in governments leaving the state organism as it was before and one which completely destroys the old state and sets up a new one in its place. See §508, post, on recognition of belligerency as an intervention. Halleck, *Int. L.*, 4 ed. (1908) Vol. 2, 485 et seq., in discussing what he calls right of resistance to the conqueror and right of revolution, says that the right of revolution is opposed by juris consults on technical ground, and admitted by the people on grounds of necessity. This illustrates the unfortunate ambiguity which attends the

use of the word "right." What the learned author is speaking of is the power of a body to resist a conqueror or set on foot a revolution. It is a question of fact entirely whether there is sufficient power to resist or revolt.

⁷ "The status of insurgency is sometimes admitted in cases where there is within a state an organized body of men pursuing public ends by force of arms, and temporarily beyond the control of the civil authority;" Wilson, *Int. L.*, (1910) 43. Insurgency defined by Lawrence, *Int. Law*, 5 ed. (1913) 354, 355, as a condition midway between belligerency and piracy. See Wilson, *Int. L.*, (1910) 43-49. Wilson & Tucker, *Int. L.*, (1901) 63. George G. Wilson, "Insurgency" Lectures, U. S. Naval War College, 1900. "Insurgency and International Maritime Law," 1 *Amer. J. Int. Law* 46; see Hall, *Int. Law* 6 ed. (1909) 29-39.

⁸ "Dependent or Semi-Sovereign States are States which without being members of a composite State retain a certain degree of sovereignty and international personality in spite

sometimes a difficult question of fact to determine just when a state ceases to be independent and when a dependent state becomes independent. There are varying degrees of dependence, from the lowest kind of external control to complete merger of the dependent state. The sole question for the international lawyer is of how far the dependent state may exercise international functions.⁹ There is some difficulty in distinguishing between a dependent state, as the State of Pennsylvania, or the State of New York, and a local political sub-division of a state, as a city. The distinction seems to be that a dependent state is a state which derives all its political authority from the people who compose it and has become dependent on another state by its own act, voluntary or forced.¹⁰ A local political sub-division, however, is a political entity created only by authority of the state of which it is a part, and it may be extinguished at any time by the authority of such a state.

There are no degrees of independence.¹¹ Independence is absolute. An independent state may bind itself by contract without impairing

of the fact that in the conduct of foreign relations they are at least partially subject to the control of another state;" Hershey, *Int. L.*, (1912) 105. "The best definition is perhaps that given by Klüber, Sec. 24: 'When one State is dependent on another in the exercise of one or more of the essential rights of sovereignty but is otherwise free, it is called dependent or *mi-souverain*,'" Hershey, *Int. L.*, (1912) 105n⁹⁰. "Part-sovereign states may be defined positively as political communities in which the domestic rulers possess a portion only of the powers of sovereignty, the remainder being exercised by some external political authority; or negatively as states which do not possess absolute control of the whole of their policy;" Lawrence, *Int. Law*, 5 ed. (1913) 62, 63. The definitions, however, are involved in hopeless obscurity by the use of the words right and sovereign. A state does not forfeit its independence so long as it retains the right of self-government by becoming a member of a federal union, paying tribute, accepting the protection of a foreign

power; 1 Wildman, *Int. L.*, (1849) 67. Test is not self-government but relation between the states. A state may have exclusive powers of self-government and yet be dependent and entirely shut off from international life. See §398, post, on effect of treaties on independence, and see §85, post, as to recognition of independence and new states.

⁹ See §52, post, on relation between independent and dependent states. For international powers and interests of dependent states, see §140, post, on intercourse; see §348, post, on treaties; see §252, post, on transfer of territory; see §614 et seq., post, on power to make war; see §670, post, on neutrality.

¹⁰ Lawrence, *Int. Law*, 5 ed. (1913) 91, says that a state loses its corporate existence when it is obliterated as a subject of international law by merger or by becoming a dependent state.

¹¹ Because, as pointed out, it negatives dependence and negatives admit of no degrees. 1 Westlake, *Int. L.*, 2 ed. (1910) 22. He admits, however, that there may be a qualification of sovereignty.

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Independent and Dependent

its independence. There are degrees of dependence, and a state may be partly dependent and yet have some part in international life.¹³

SEMI-INDEPENDENCE—NOTION OF.

§51. A number of writers speak of semi-independent or semi-sovereign states in referring to dependent states which have some international functions.¹³ The phrase is, it is believed, inaccurate because the exercise or non-exercise of the international function has no reference to the degrees of dependence, but simply depends upon the relation existing between the independent state and the dependent state dependent upon it. The proper distinction is between states with and states without international functions, which distinction, of course, cannot always be drawn clearly in fact as some dependent states will have more international functions than others. There is, furthermore, no such equal distribution of international functions between the independent and dependent states as will suffice for an accurate use of the word "semi."

THE RELATION BETWEEN INDEPENDENT AND DEPENDENT STATES.

§52. The relation between dependent and independent states assumes a number of different forms, many of them matters of historical accident.¹⁴ The different forms of the relation are entirely imma-

¹³ A curious distinction has been drawn between external and internal independence; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 177. It is submitted that the distinction is unsound. Independence is a fact of freedom of control by a superior and from interference by an equal, and is predicated entirely of and upon that which exists outside of the independent body. It cannot, therefore, be external or internal. Internal independence is about as significant as internal superiority.

¹⁴ Dependent states designated as semi-sovereign by some writers; 1 Halleck, *Int. L.*, 4 ed. (1908) 79. Hall, *Int. Law* 6 ed. (1909) 26, speaks of imperfect independence.

¹⁵ Canada in British Empire has international functions. Hershey, *Int.*

L., (1912) 94, 95, says that the constitutions of Canada and Australia, although made by themselves, are technically grants of the British Parliament, and the exercise of international functions they enjoy is due to the discretion and wisdom of the British Government. "The Constitution of Canada in its Historical and Practical Working," William R. Riddell (1917). The member states of the German Empire have some international status, while those of the United States of America have none, yet each is a federal union. The member states of the United States are, by the Federal Constitution of 1787, Art. 1, Sec. 10, prohibited as follows: "No state shall enter into any treaty, alliance or confederation. . . . No state shall

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terial in international law, and the only question is of how far the dependent state is wholly shut off from international life and relations. This is a question of fact generally answered by the attitude which the independent state upon which the state is dependent assumes. The sole question as to a dependent state for the international lawyer is whether and to what extent that state exercises international functions. Many writers attempt to classify these different relations and lay down rules as to the degrees of participation in international life defined by each relation.¹⁵ This, it is apprehended, is unsound, as the names of the different relations are indiscriminately used and different aspects appear under what is designated by the same name. The conventional classification is into suzerain states, vassal states, half-sovereign states, protected states, international protectorates.¹⁶

without the consent of congress . . . enter into any agreement or compact with another state or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay." There was a difference of opinion as to the status of the former South African Republic, 1 Oppenheim, *Int. L.*, 2 ed. (1912) 181, Great Britain contending that it was not independent, and the South African Republic contending that it was. See 1 Oppenheim, *Int. L.*, (1912) 181, where he expresses the opinion that Cuba is independent, and, on 182, that Panama is not an American protectorate.

¹⁵ Futility of attempts at classification pointed out by Manning, *Int. L.*, 2 ed. Amos. (1875) 95. Nature of relation between independent and dependent states of more importance than extent of its dependence; 1 Halleck, *Int. L.*, 4 ed. (1908) 71. The unsatisfactory nature of the current terms apprehended by Lawrence, *Int. Law*, 5 ed. (1913) 63 et seq., who, however only adds fresh confusion by propounding the term "client states" as applicable to those which are in fact dependent. Twiss, *L. of Nations*, Peace, 2 ed. (1884) 19, says that an

independent state may separate itself from the independent community of which it has been a member and declare itself an independent state, which requires no recognition so long as it abstains from international intercourse. He cites no instance. The situation is believed to be practically impossible. See *Ibid.* 22-46 for a discussion of dependent states, some of which he calls protected independent states.

¹⁶ "Vassal and suzerain states" term borrowed from feudalism. For etymology of, see 1 Westlake, *Int. L.*, 2 ed. (1910) 220; Hershey, *Int. L.*, (1912) 105, 106; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 140-144; 1 Westlake, *Int. L.*, 2 ed. (1910) 25. Protectorates: Hall, *Int. Law*, 6 ed. (1909) 125-128; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 144-147; 1 Westlake, *Int. L.*, 2 ed. (1910) 22, 121 et seq. International Protectorates: Hershey, *Int. L.*, (1912) 107, who (108) distinguishes between international protectorates, a merely protected state, and a colonial protectorate. He also distinguishes what he calls states without full sovereignty from what he calls colonial states. E. g.—Dominion of Canada or Commonwealth of Australia, which latter, he says, has no international position

There is, however, a distinction of importance which has been generally overlooked although sometimes indirectly referred to. These dependent states may be divided into three classes: (1) those where the dependent and independent states are so united that each actually governs the same territory so that the people have two organizations exerting the power of the community, a superior and inferior, which inferior may or may not have functions in international life. This is a federal union. (2) Where the superior state exercises no function of government within the dependent state but controls it entirely through external contact with its organization. (3) Where the dependent is completely merged in the superior state and loses its identity entirely as a state.¹ Some dependent states are referred to in the note.²

whatever, and in the note (110) that a treaty concluded by Canada with foreign states is not a Canadian treaty but a treaty concluded by Great Britain for Canada. For a discussion of the various kinds of these states, see Hershey, *Int. L.*, (1912) 105 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 72, 73; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 140-147; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 22-46. Lawrence, *Int. Law*, 5 ed. (1913) 167 et seq., discusses the relation between independent and dependent states under the heading of the different degrees of power possessed by the independent states over the territory of the dependent state, which is entirely aside from the question of the international functions of the dependent state. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 37, properly points out the disproportionate amount of space given by the writers to the different kinds of unions. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 133 however, disagrees, and says many important questions are connected with the question, which is true. But the important question is of the international function of the dependent state upon which no light is shed by an elaborate classification of different kinds of relations.

¹ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 139. Difficulties will arise as to international aspect as between independent states and dependent states and third states. Sometimes as in the United States of America, international activity in certain aspects is not prohibited by the federal constitution but the federal government is not vested with complete municipal control co-extensive with its international aspect. See §458, post. Lawrence, *Int. Law*, 5 ed. (1913) 68, designates a confederacy as a part sovereign state. His remarks are ambiguous as the member states of the confederation are dependent but it is difficult to see how the confederation is anything but independent. See Zouche, *L. of Nations* (1650), Carnegie ed., Part 1, VIII, 4, 5, 6, as to the different relations between the Roman Empire and dependent states. See Hershey, *Int. L.*, (1912) 106; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 24, as to member states of the Holy Roman Empire. See Zouche, *L. of Nations* (1650), Carnegie ed., Part II, II, as to relation between princes, superiors and inferiors.

² The following are instances of dependent states: *Abyssinia*, 1 Oppenheim, *Int. L.*, 2 ed. (1912) 16, 145, 147.

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American Indians were under the protection and care of the United States of America, and although at various times recognized by the latter as independent states, never seem to have had any status in international life. Neither international nor colonial protectorates, but in a sense protectorates, and in a class by themselves; 1 Halleck, *Int. L.*, 4 ed. (1908) 81n¹, 82, 83; Hershey, *Int. L.*, (1912) 109n¹; 1 Moore, *Dig. of Int. L.*, (1906) 30-39; Wheaton, *Elements*, Dana's ed. (1866) 58-60; "Indians and the Law," Austin Abbott, 2 *Harv. L. Rev.* 167 et seq. **Andorra**, Republic of, is under the joint protectorate of France and Spain; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 146; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 44; not even a state, according to Hershey, *Int. L.*, (1912) 109n¹⁰. **Annam**, French protectorate over; Hershey, *Int. L.*, (1912) 107. **Barbary States**, Turkey; Wheaton, *Elements*, Dana's ed. (1866) 57. **Cambodia**, France; Hershey, *Int. L.*, (1912) 107. **Cracow**, former free city of, under protection of Russia, Austria and Prussia, by Congress of Vienna; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 37-43; Wheaton, *Elements*, Dana's ed. (1866) 53; Historical protectorate, according to Hershey, *Int. L.*, (1912) 107n¹⁴. **Crete**, a vassal autonomous state under the suzerainty of the Ottoman Porte; Hershey, *Int. L.*, (1912) 106n². **Cuba** and the United States of America. "The joint resolution of Congress respecting relations between the United States and Cuba," Carman F. Randolph, 1 *Col. Law Rev.* 352. A protected state, according to Hershey, *Int. L.*, (1912) 108n¹⁸ but there are opinions to the contrary; Lawrence, *Int. Law*, 5 ed. (1913) 66. **Cuba and International Relations**, (1899) J. M. Callahan. **Confederacy of the Rhine** (1806-1813), France, Hershey, *Int. L.*, (1912) 109. **Cyprus**, Lawrence, *Int. Law*, 5 ed.

(1913) 79. **Dominican Republic**; protectorate of United States of America, 1 Moore, *Dig. of Int. L.*, (1906) 279. **Egypt** was formerly a tributary state under suzerainty of the Ottoman Porte, 1 Oppenheim, *Int. L.*, 2 ed. (1912) 142, but in fact the country was occupied and its affairs practically administered by Great Britain. Dec. 8, 1914, Great Britain proclaimed British protectorate. The Khedive of Egypt, Albas M. Pasha, was deposed, and Prince Huzzlein Kamel Pasha, last living prince of the family of Mohammed, was made Khedive of Egypt. See table of international persons, and Wheaton, *Elements*, Dana's ed. (1866) 56. Vassal state, according to Hershey, *Int. L.*, (1912) 106n², and on 107 he says it is an international protectorate since Franco-British agreement of 1904; **Federated Malay States** since 1847 under protection of Great Britain "as a relation of international law," whatever that means; 1 Westlake, *Int. L.*, 2 ed. (1910) 83. **Ionian Islands**, United Republic of Great Britain exercised a protectorate over from 1815 to 1863, when they were united to Greece; Walker, *Man. Int. L.*, (1895) 15; Wheaton, *Elements*, Dana's ed. (1866) 53, 54, 55. An historical protectorate according to Hershey, *Int. L.*, (1912) 107n¹⁴. See Twiss, *L. of Nations, Peace*, 2 ed. (1884) 33; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 101-111; 1 Westlake, *Int. L.*, 2 ed. (1910) 23. **India**. The princes of the native states have been described as vassal states of Great Britain. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 27; are protectorates but not international protectorates or colonial protectorates. In class by themselves. Hershey, *Int. L.*, (1912) 110, 111. 1 Oppenheim, *Int. L.*, 2 ed. (1912) 142. "The Native States of India," (1910) Sir William Lee-Warner. See 7 *Amer. J. Int. Law*, 676. **Jahore**, state of, in Malay Peninsula.

Great Britain exercises protectorate over, assumed by treaty of December 11, 1885; 1 Westlake, *Int. L.*, 2 ed. (1910) 83. **Khanates** of Khiva and Bokhara—Russia; Hershey, *Int. L.*, (1912) 108. **Korea**—Japan; Hershey, *Int. L.*, (1912) 108; Lawrence, *Int. Law*, 5 ed. (1913) 67. **Kniphausen, Lordship of**, in North Germany, which exercised independent jurisdiction over and had a flag of its own under the protection of the German Confederation and the suzerainty of Oldenburg; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 100; for full discussion of see Twiss, *L. of Nations, Peace*, 2 ed. (1884) 30. Merged in 1854 in Oldenburg; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 143. **Madagascar**—France formerly exercised protectorate over, and by law of August 6, 1896 declared it a French colony. Hershey, *Int. L.*, (1912) 107n²⁸; 1 Westlake, *Int. L.*, 2 ed. (1910) 84. **Marshall Archipelago**—Germany; (August 1, 1914); Hershey, *Int. L.*, (1912) 108. **Moldavia, Wallachia and Servia** were under the suzerainty of the Ottoman Porte; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 100; Wheaton, *Elements*, Dana's ed. (1866) 55. **Monacco** was under the protectorate of Florence, Spain, until 1693; Savoy, France, until 1815, and Sardinia since. Italy has never exercised the protectorate; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 146; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 28; Wheaton, *Elements*, Dana's ed. (1866) 56; Now wholly unprotected; Hershey, *Int. L.*, (1912) 109n³⁰. **Montenegro**—Turkey; Wheaton, *Elements*, Dana's ed. (1866) 56. **Morocco**—France; Hershey, *Int. L.*, (1912) 107. "The New Moroccan Protectorate," Norman Dwight Harris, 7 *Amer. J. Int. Law*, 245. **New Guinea**—Germany, (August 1, 1914); Hershey, *Int. L.*, (1912) 108. **North Borneo**—"Great Britain has assumed a protectorate on North Borneo, over the State of Sara-

wak, the Sultanate of Brunei, and the Territories of the North Borneo Company, in doing which she had gratuitously embarrassed herself by expressly recognizing their independence, and by specific limitations upon her own freedom of action, which, especially in the case of Brunei, are exceedingly likely to lead to difficulty with foreigners;" Hall, *Int. Law* 6 ed. (1909) 128n.¹ **International Protectorate**; Hershey, *Int. L.*, (1912) 107. **Polizza, Republic of**, in Dalmatia under protectorate of Austria; Wheaton, *Elements*, Dana's ed. (1866) 56. **Porto Rico and the United States of America**. "The Relations between the United States and Porto Rico," Pedro Capó-Rodríguez, 9 *Amer. J. Int. Law*, 883; 10 *Amer. J. Int. Law*, 65, 312. **Panama**. A protected State according to Hershey, *Int. L.*, (1912) 108n²⁹; For text of convention between United States and Panama see 3 *American J. Int. L.*, Supp. 130 et seq. **San Marino Republic** enjoyed protection of the Pope under formal treaty from 17th century to 1862. In 1862 taken under the exclusive protective friendship of Italy. Has *chargé d'affaires* at Paris, and consuls in Italy, France and Austria; Hershey, *Int. L.*, (1912) 108, 109n³⁰; Lawrence, *Int. Law*, 5 ed. (1913) 77; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 146; 1 Westlake, *Int. L.*, 2 ed. (1910) 23. **South Africa Republic** or Transvaal formerly under Great Britain (1881-1902); 1 Oppenheim, *Int. L.*, 2 ed. (1912) 142; Hershey, *Int. L.*, (1912) 106n²⁹, says was a historical protectorate. **Tunis** and its Bey and France, a protectorate; Hershey, *Int. L.*, (1912) 107; 5 Moore, *Dig. of Int. L.*, (1906) 402. **Togo**, King of—Germany; (August 1, 1914) Hershey, *Int. L.*, (1912) 107. **Zanzibar, Sultanate of**—Great Britain protectorate; Hershey, *Int. L.*, (1912) 107; 5 Moore, *Dig. of Int. L.*, (1906) 869.

Classification of States

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NEUTRALIZED STATES.

§53. A neutralized state is an independent state which by agreement, signified by a treaty between itself and other states, is deprived to a greater or less extent of the function of making war, and therefore relegated to a greater or less position of neutrality in any existing war between the other states parties to the treaty.³ The principal neutralized states are referred to in the note.⁴ A state not a party to the treaty is not bound by it to observe the neutrality of such a state, but the terms of the treaty may impose on the state neutralized

³ A neutralized state is to be distinguished from the neutralization of a particular territory, as, for instance, the Suez Canal, Straits of Magellan; for a discussion of which see §669, post. See discussion by the American Society of International Law, 11th Annual Meeting proceedings, 1917, pp. 125-144. "The Neutralization of States in the Scheme of International Organization." "The Neutrality of Honduras and the Question of the Gulf of Fonseca," Salvador Rodríguez Gonzáles, 10 Amer. J. Int. Law, 509 et seq. "Neutralization and Equal Terms," Crammond Kennedy, 7 Amer. J. Int. Law, 27 et seq. "Autonomous Neutralization," Stewart MacMaster Robinson, 11 Amer. J. Int. Law 607 et seq. "Some Effects of Neutralization," Cyrus F. Wicker, 5 Amer. J. Int. Law 396 et seq. "Neutralization," Erving Winslow, 2 Amer. J. Int. Law 366 et seq. Woolsey, Int. L., 6 ed. (1897) 268; 1 Westlake, Int. L., 2 ed. (1910) 29. "A neutralized State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for defense against attack, and never to enter into such international obligations as could indirectly drag it into war;" 1 Oppenheim, Int. L., 2 ed. (1912) 147, 148. "Neutralized States are those whose neutrality, independ-

ence or territorial integrity are permanently guaranteed by an international agreement of the Great Powers on condition that they agree never to go to war except in case of attack, and never to assume international obligations (as e. g. enter into a treaty of alliance or guarantee) which might lead them into hostilities;" Hershey, Int. L., (1912) 111.

⁴ Belgium neutralized by Treaty of London of Nov. 15, 1831, and April 19, 1839, Art. 7. 3 American J. Int. L., Supp. 108; 1 Moore, Dig. of Int. L., (1906) 26; 1 Oppenheim, Int. L., 2 ed. (1912) 152. "The Neutrality of Belgium," Alexander Fuehr, (1915.) "Belgium Neutral and Loyal," Emile Waxweiler, (1915.) Hershey, Int. L., (1912) 111n³; 1 Westlake, Int. L., 2 ed. (1910) 37 et seq. "Belgium and the Great Powers: Her Neutrality Explained and Vindicated;" (1916) Emile Waxweiler. Congo Free State, Former, Hershey, Int. L., (1912) 113n; 1 Moore, Dig. of Int. L., (1906) 27; 1 Oppenheim, Int. L., 2 ed. (1912) 153; 1 Westlake, Int. L., 2 ed. (1910) 30. Corfu and Paxso, Islands of; Hershey, Int. L., (1912) 112n. "By the treaty of March 29, 1864, Art. 2, 'the courts of Great Britain, France and Russia, in their character of guaranteeing powers of Greece, declare, with the assent of the courts of Austria and Prussia, that the islands of Corfu and Paxso, as well as their dependencies, shall after their

an obligation of neutrality with respect to states outside the treaty.⁵ It seems to follow that a neutralized state is impliedly inhibited from entering into any treaty or course of action necessary or likely to involve it in a war in violation of the terms of the agreement of the treaty of neutrality.⁶

union to the Hellenic Kingdom enjoy the advantages of perpetual neutrality. His Majesty the King of the Hellenes engages on his part to maintain such neutrality;" 1 Moore, Dig. of Int. L., (1906) 26. **Cracow**, Former Republic of, neutralized by act of Congress of Vienna of 1815; Halleck, Int. L., 4 ed. (1908) Vol. 1, 72, says sovereignty of was not impaired; Hershey, Int. L., (1912) 113n⁴⁹; Wheaton, Elements, Dana's ed. (1866) 53. **Ionian Islands**, United States of, Constituted by Convention of Paris of Nov. 5, 1815, between Austria, Great Britain, Prussia and Russia. For some of the provisions, see Wheaton, Elements, Dana's ed. (1866) 53, 54; 3 American J. Int. L., Supp 117. **Luxemburg** neutralized by the Treaty of London of May 11, 1867; 3 American J. Int. L., Supp. 118; Hershey, Int. L., (1912) 111n⁵⁰; 1 Moore, Dig. of Int. L., (1906) 26; 1 Oppenheim, Int. L., 2 ed. (1912) 152. **Malta**, Attempt to neutralize by Treaty of Amiens, Art. 10, between Great Britain and France, 1801-1802, but failed of execution. Said to be first case of attempted permanent neutralization; Hershey, Int. L., (1912) 113n⁵⁰. **Norway** perhaps neutralized in 1907; Hershey, Int. L., (1912) 113n⁵⁰. **Samoan Islands**, 1 Moore, Dig. of Int. L., (1906) 27. W. S. Penfield, 7 Amer. J. Int. Law, 767. **Savoy**, portion of, Treaty of Vienna of 1815; Hershey, Int. L., (1912) 111n⁵⁰. **Switzerland** neutralized by Art. 84 of the Act of Congress of Vienna of 1815; 1 Moore, Dig. of Int. L., (1906) 26; 1 Oppen-

heim, Int. L., 2 ed. (1912) 151; For text of the supplementary convention of Nov. 20, 1815, between Austria, France, Great Britain, Prussia and Russia, see 3 American J. Int. L., Supp. 106. "The Maintenance of Swiss Neutrality in Present War," 65 Univ. of Pa. L. Rev. 315 et seq.; "The Neutrality of Switzerland," 12 Amer. J. Int. Law 241, et seq., 462 et seq., 780 et seq., Gordon E. Sherman. For comments on the distinction between the terms of the guarantees of neutrality of Belgium, Switzerland and Luxemburg, see Hershey, Int. L., (1912) 111n⁵⁰; 1 Westlake, Int. L., 2 ed. (1910) 28.

⁵ "If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent by taking up an attitude which shows that they agree to the neutrality although they do not guarantee it;" 1 Oppenheim, Int. L., 2 ed. (1912) 148. The learned professor cites no authority for the statement, and it is difficult to find any such obligation resting upon powers not a party as the neutrality of such a state may be violated without such a third power being in any way concerned.

⁶ As to neutralized state entering into a treaty of guarantee, see §347, post, or ceding territory, see §249, post. Oppenheim, Int. L., 2 ed. (1912) Vol 1, 149, says neutralized states cannot cede territory or acquire without consent of the powers, and cannot conclude treaties of alliance or guarantee. This statement is believed to be too broad. 1 Westlake, Int. L., 2 ed. (1910) 28.

Government of a State

§§54, 55

The Government of a State.**PRELIMINARY AND DEFINITION.**

§54. The government of a state is the political organization which exercises the power of the state,⁷ but the word is sometimes used in popular parlance to denote the party having control of that organization. The government is the organ through which the state preserves its contact with other states and participates in international life. Many writers, however, discuss the forms of government of a state as a form of the state under the influence of the use of the word state as referring to the government of the state, and failing to distinguish between a state and its government.⁸

DISTINCTION BETWEEN A STATE AND ITS GOVERNMENT.

§55. The power of the state will be exerted through some form of political organization, and that political organization may, from time to time, be in the hands of different individuals.⁹ There is, therefore, a complete distinction between the state as a whole and its government and the governors, the identity of which is determined solely by municipal law. Each independent state must determine for itself what political organization to recognize and deal with in each particular case. This is a question of fact and no rule can be laid down. Generally, there is no difficulty and it is only in the case of a revolution or disorder in a community in a backward state of civilization that the question arises. The state consists of the body of men exercising its power, and the government is the organ through which that power is exercised. To be accurate, we should therefore discuss international law in terms of government of the states, and say that the conduct of the government of independent states is determined by external factors of international life. This, however, is too cumbersome a phrase, and the meaning of the word "state"¹⁰

⁷ The government of a state is a matter entirely of municipal law, sometimes classified under right of independence; Wheaton, *Elements*, Dana's ed. (1866) 122 et seq.; Zouche, *L. of Nations* (1650) Carnegie ed., Part I, II, 1 et seq.

⁸ Hershey, *Int. L.*, (1912) 10 et seq.

⁹ A state does not enjoy any (so called) rights because of its peculiar internal organization, and changes therein are of no international effect. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 20, 21.

¹⁰ See §42, ante, on definition of a state.

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Forms of Government

as used in this connection is perhaps sufficiently clear, although not altogether free from ambiguity to warrant its use in deference to established usage.¹¹

FORMS OF STATE GOVERNMENT.

§56. These state governments appear in several different forms, which will be referred to in passing but which are of subordinate importance.¹² There is, however, the distinction between the personal unlimited government of an autocrat and the case of a limited government in which the people have a representation, a distinction which will be frequently referred to and has in fact had an important influence upon international relations. Where the state has a single political organization throughout its extent there is a simple form of government, or as it is usually expressed, a simple state.¹³ Where there are several states, each with a distinct government and united

¹¹ It is not always easy to determine when to depart from established usage and it is only desirable to do so in the interest of clear thinking. Sometimes a word can easily be discarded, as sovereignty (see §48, ante) and another word substituted which is clear. It is objectionable to coin new words as the legal profession is very conservative and accepts new ideas with difficulty, and all such must be couched in some familiar phraseology in order that they may slowly filter into the hardened casing of the legal mind. Even then it takes a long while for them to have any effect.

¹² Lawrence, *Int. Law*, 5 ed. (1913) 59. Some writers regard the form as of considerable importance (E. g. 1 Lorimer, *Inst.* (1883-4) 162 et seq.) apparently on the theory that the form of the government largely determines the international conduct of the state. It is more accurate, however, to say, that the government is a product of the state life; *Ibid* 162 et seq. expresses the opinion that certain governments are excluded from recognition

on the ground that the form of internal government under which they live incapacitates them from expressing or realizing reciprocating will, that is, personal governments. Vattel, (1758) *Chitty's Trans.* Book I. §3. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 16, 17, says forms of government immaterial but that change in continuity of state government is of importance in international relations, that in absolute monarchies the relations are considered as maintained *de jure* between the two crowns. For reference to forms of government, see Hall, *Int. Law* 6 ed. (1909) 23 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 49 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 65 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. VII. 1-4 and II et seq. The government should be discussed separately, and it is misleading, as Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 132 et seq. does, to discuss the government as affecting the personality of an independent state.

¹³ E. g.—France, Belgium, Russia, &c.

by some relation, there is a composite government or state.¹⁴ A personal union exists where there are two monarchies, and the same individual occupies the throne of each in which case the separate identity of each state remains in its international aspect entirely as if the same person did not occupy the thrones.¹⁵ The term "real union" is usually confined to monarchies and is used where the governments are so combined that they exercise joint international

¹⁴ All confederacies and federal unions are composite states. Close confederation and loose confederation. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 77; and Wheaton, *Elements*, Dana's ed. (1866) 65, distinguish confederated states and composite states, by latter term apparently meaning a federal union. "A composite International Person is in existence when two or more Sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great extent as one international person," and are of two kinds: real unions and federated states; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 133.

¹⁵ Personal unions were formerly of frequent occurrence but none are in existence at the present time (1919). The following have occurred: 1386—Duke Jagello was elected King of Poland thereby forming personal union with Lithuania. 1519–1558—Spain and the Empire during the reign of Charles V. Prussia and Neuchâtel down to 1857. Saxony and Poland, 1697–1763. Schleswig-Holstein and Denmark, 1773–1863. England and Scotland, 1603–1707. Great Britain and Hanover, 1714–1837. Netherlands and Luxemburg, 1815–1890. Belgium and Congo Free State, 1885–1908. "A personal union is in existence when two Sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as

monarch;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 133. See Twiss, *L. of Nations, Peace*, (2 ed. 1884) 48 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 60, 61. By the treaty between Denmark, France, Great Britain and Russia, signed at London, July 13, 1863, for the accession of George I. to the throne of Greece, it is expressly declared (Art. IV.) that in no case shall the crowns of Greece and Denmark be united on the same head. A similar declaration was made in the Peace of the Pyrenees, of November 7, 1659, and the treaty of Utrecht (1713), in regard to the crowns of France and Spain; 1 Moore, *Dig. of Int. L.*, (1906) 22. The constitution of Brazil provided that its crown should never be on the same head as that of Portugal. Marriage between reigning sovereigns did not always result in permanent incorporation of territories, as for instance, Philip of Spain and Mary of England; Francis II. of France and Mary of Scotland; William of Orange and Mary of England; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 384. Thus, if one state of the personal union is engaged in war, it does not necessarily involve the other; Vattel, (1758) Chitty's Trans. Book I. §9. 1603—James VI. of Scotland, at peace with Spain, succeeded to the British crown on the death of Elizabeth, England being at war with Spain. James had friendly relations with Ferdinand and Isabella, regents of the Netherlands, before peace between England and Spain in 1604.

functions.¹ A confederacy is where the governments of several states combine and form a central government for the discharge of certain functions of government and international relations. The characteristic of a confederacy is that the government rests on the states only and has no relation whatever to the people composing the states, and its acts affect only the particular states and not the individual members.² A federal union is a government brought about by the union of several independent states, but has the distinguishing

¹ Real Unions.—E. g.—United Kingdom of Great Britain and Ireland, 1707–1919. Lawrence, *Int. Law*, 5 ed. (1913) 59, 60, distinguishes Great Britain and Ireland since 1700 as an incorporate union. Sweden and Norway probably constituted a real union in 1814, 1 Westlake, *Int. L.*, 2 ed. (1910) 35, although many writers hold a contrary opinion. The union was peacefully dissolved by treaty of Karlstadt of October 26, 1905. The independence and integrity of Norway, which became a separate kingdom, was guaranteed by Great Britain, France, Germany and Russia by treaty of Christiania of November 2, 1907; 1 Moore, *Dig. of Int. L.*, (1906) 22; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 135; Twiss, *L. of Nations, Peace*, (2 ed. 1884) 51 et seq. As to dissolution between Norway and Sweden, in 1905, see Wilson, *Int. L.*, (1910) 28n¹⁰. Austria and Hungary became a real union in 1723 by pragmatic sanction providing for succession of Maria Theresa to both thrones. There is a difference of opinion whether the union before that date was real or personal. Wheaton, *Elements*, Dana's ed. (1866) 61n¹¹. In 1849 Hungary was united to Austria. In 1867 Hungary became a separate state and the real union was re-established; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 134–135. Saxe-Coburg and Saxe-Gotha in the German Empire are real unions, according to Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 134n¹².

Denied, see Hershey, *Int. L.*, (1912) 103n¹⁴. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 76–77, draws a distinction between a real and an incorporate union which he does not make clear, and which seems immaterial from any point of view. "A Real Union is in existence when two Sovereign States are by an international treaty recognized by other Powers, linked together forever under the same monarch so that they make one and the same International Person;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 134. The union is not itself a state but a union of two states, which make one composite international person. As to the nature of the union between Russia and Poland established by the Congress of Vienna, see Wheaton, *Elements*, Dana's ed. (1866) 63, 64.

² Confederacies of which none are in existence at the present time (1919).—The following examples have occurred: Greek Confederation. The empire as constituted by the Peace of Westphalia in 1648 and Germany from 1815–1866; Wheaton, *Elements*, Dana's ed. (1866) 65–77. The confederation was formed in 1815, but it was not finally organized until the signature of the Schluss Act in 1820. See the Federal Act in *De Martens Nouv. Rec.* II, 353, and the Schluss Act, *Id.* V, 466; Hall, *Int. Law* 6 ed. (1909) 26n¹. United Provinces of the Netherlands, 1580–1795. United Confederate States of America, 1778–1787. Switzerland, 1291–1798, and 1815–1848; Wheaton,

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characteristic that the federal government rests not only upon the states but also upon the people who are members of those states, and its laws bind the individual members of the dependent states apart from those of the dependent states themselves.³

DE FACTO GOVERNMENT.

§57. All governments which exist are *de facto* in the sense that they are existing governments.⁴ Some may be unlawful, according to municipal law, and, in such cases, there is a possible government lawful according to municipal law which should exist in that particular instance, but which does not so exist. The term "*de facto*" seems to be applied to the government existing in such a case as describing it as an existing government, in opposition to that which ought to exist but which does not. The independent states of the world must necessarily deal with the government which exists in fact because it is the only political organization of the state which can participate in international intercourse. A *de facto* government is the government which exists in fact. It is one which is really existing, and there is a certain confusion in thought in using the

Elements, Dana's ed. (1866) 83-88. Confederation of the Rhine (Rheinbund), 1806-1813. Major Republic of Central America composed of Honduras, Nicaragua, and San Salvador, 1895-1898. The Southern Confederacy which revolted against the United States of America in 1861 never became a state in international life. See Lawrence, *Int. Law*, 5 ed. (1913) 68 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 136.

³ There are a number of federal governments now (1919) in existence, which with the date of the beginning of such government, are as follows: United States of America (1787), Switzerland (1848), Mexico (1857), Argentina (1860), Brazil (1891), Venezuela (1893). Canada, Australia and South Africa are federated unions within the British Empire. Canada apparently has some international functions. Hershey, *Int. L.*, (1912) 104n¹⁸, says that they are not even

states, as to which see §52n¹⁴, ante. 1 Westlake, *Int. L.*, 2 ed. (1910) 35. Wilson, *Int. L.*, (1910) 34, says German Empire had some of the aspects of a confederacy because some of the member states had international functions. This, however, is immaterial to the distinction between a confederacy and a federal union. As to Sardinia absorbing Italy, see Hall, *Int. Law* 6 ed. (1909) 21n¹.

⁴ Woolsey, *Int. L.*, 6 ed. (1897) 40, says that international law knows only governments *de facto*, by which he probably means government in fact. "Governments *de Facto*," Everett P. Wheeler, 5 *Amer. J. Int. Law*, 66 et seq. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 165, says the act of a *de facto* government which is submitted to by the great body of people and recognized by other states is binding as the act of the state, and it is unnecessary to examine into the origin, nature and limits of that authority.

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word to distinguish from a *de jure* government, which is also an actual existing government in many cases. The phrase was probably originally used to distinguish the government which is actually existing, although unlawfully, from the lawful government which is not in existence.⁶

TITLE OF THE GOVERNMENT.

§58. The government of a state may assume such title as it sees fit, which is a matter solely of municipal law. The title, however, will not have any currency in international life until it has been recognized by other states, which recognition is usually a matter of course after the recognition of the government.⁶ In former days of personal rule of kings, titles were of importance as indicating the rank of the holder, and anyone desiring to assume the title "king" would have some difficulty in having his claims recognized. There were consequently a number of controversies arising from time to time in Europe over the recognition of these titles which were often a cause of war. The Pope and the Emperor each had the admitted power of conferring titles of royal rank.⁷ The discussion of the subject belongs to history and need not be further pursued here. A few instances are collected in the note.⁸

DIFFERENT GOVERNMENTS IN THE SAME STATE.

§59. It sometimes happens that there will be different governments, or what appear to be different governments, in the same

⁶ The following instances of *de facto* governments have occurred: The Commonwealth in England, 1 Moore, Dig. of Int. L., (1906) 41. Castine Island in Maine, 1 Moore, Dig. of Int. L. (1906) 42. For a discussion of the Confederate States of America as a *de facto* government, see 1 Moore, Dig. of Int. L., (1906) 52, et seq. The government of a ceded territory between the date of the treaty of cession and the actual delivery of possession has been styled a *de facto* government. See §250, post, as to transfers of state territory by *de facto* governments.

⁶ See §86, post, on recognition of titles of government.

⁷ Certain titles were originally be-

stowed by the Pope on monarchs and assumed by them, as follows: Kings of France, "Rex Christianissimus, First Born Son of the Church." Kings of Spain, since 1496, "Rex Catholicus." Kings of England, since 1521, "Defensor Fidei." Kings of Portugal, since 1478, "Rex Fidellissimus." King of Hungary, since 1758, "Rex Apostolicus."

⁸ Some of the titles which have been assumed in the past are as follows: The former republic of Venice, as well as the republic of Genoa, were known as "Serene Republic;" the republic of San Marino as "Most Serene Republic." By the German constitution of 1871, the kings of Prussia hold the

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state. This may be a case of different political factions contending for control of the same government, the usual phenomenon in democratic countries, or it may be two distinct governments contending for possession of the state. The contest in each case may be by peaceful methods or by violence, and may result in a new state being formed or merely in a change in the government.⁹

PERSONALITY OF A STATE.

§60. The bodies we call states exhibit many of the characteristics of individuals and have been regarded and described as persons. This conception was more appropriate when the monarch was the state and it was his individual property. It is, however, a well-settled and useful idea employed in modern times. Monarchies and kingdoms are usually referred to in the feminine gender, and republics in the neuter gender.¹⁰ The conception is useful as a means of reference, but must be used with caution as a state in many respects differs materially from individuals, and many mistakes have been made by the writers by failing to observe that distinction. The term "international person" is used by the writers in several senses. Some suppose that it refers only to members of the family of nations; others that it includes all independent states whether members or

title "German Emperor." The king of England has been styled "Emperor of India" since 1877. The title of king was assumed by the following princes: Servia, 1881; Roumania, 1882; Bulgaria, 1908; Montenegro, 1910. The title of "Emperor of Russia" assumed by Peter the Great in 1701; 1 Halleck, *Int. L.*, 4 ed. (1908) 126, not recognized by France until 1745; Spain, 1759; Poland, 1764. The title of "King of Prussia" assumed in 1701 was not recognized by the Pope until 1786. 1 Halleck, *Int. L.*, 4 ed. (1908) 126. See Wheaton, *Elements*, Dana's ed. (1866) 236, for a discussion of these and other cases. 1897, Oct. 12—King of Korea assumed title of Emperor; 4 Moore, *Dig. of Int. L.*, (1906) 463. As to the title of German Emperor, see Zouche, *L. of Nations* (1650), Carnegie ed., Part

II. II. 1-3 and Bryce, "Holy Roman Empire," 188 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 126, 127n¹; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. II.; Vattel, (1758) Chitty's Trans. Book II. §§42-47. As to title of the King of Great Britain, see 1 Halleck, *Int. L.*, 4 ed. (1908) 127n¹.

⁹ This is to be distinguished from the case of two states in the same territory, as to which see §216, post. The case of two Popes, which sometimes occurs, illustrates rival factions contending for the same government. See §49, ante, as to belligerency and insurgency.

¹⁰ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 2, 398, refers to the United States of America in the feminine gender, which is obviously a slip of the pen.

not, and some include dependent states. It will be used in this treatise to mean all independent states whether members of the family of nations or not, and to include all dependent states exercising international functions. Some of the views of the writers are collected in the note.¹¹

There are certain qualities which are inherent in a state as a part of its personality, such as dignity, honor, reputation, and of which a state demands recognition by other states. These qualities were evident in the case of monarchial governments when an individual occupied the throne, but have been retained by democracies. Indeed, they seem necessary to the maintenance of international intercourse on any satisfactory basis, and the people of a democracy may feel as keenly as a monarch acts damaging to any of these qualities committed by another state. Although trifles, they are of importance as the people are impressed by the proper maintenance of them by a government in a republic as well as a monarchy. The writers,

¹¹ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 107, says that the conception of international persons is derived from the conception of the law of nations. It is submitted that it is derived from existing facts, to-wit, independent states. The learned professor's remarks are ambiguous furthermore as he does not explain whether he means the conception which the law of nations formed of international persons or the conception which somebody else has formed of the law of nations. "It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations;" Hall, *Int. Law* 6 ed. (1909) 17. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 107, 108, says international persons are the only states subject to international law; that dependent states having some international functions are imperfect

international persons. That confederations of states, insurgents recognized as belligerents in the Civil War, and the Holy See are apparently not real international persons. It is difficult to see the merit of this elaborate refinement in the distinctions of international persons. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 21, says it is not necessary for a state to be independent in order to be a state of international law. "The personal identity (independent states) which is thus established exists in the eye of the law solely for international purposes;" Hall, *Int. Law* 6 ed. (1909) 20; upon which it is to be observed the law has no eyes and nothing can exist in such supposed eyes metaphorically or actually. The facts are that independent states are the only international persons because the only bodies free from external political control. Therefore, the international factors operate on them alone, consequently international law is only a jural conception of the conduct of such bodies. The personal identity of a state can be established without its being an international person.

therefore, constantly speak of what they call the right of reputation, etc., using the word "right" here in the sense of interest.¹²

Changes in State Life: Origin and Extinction of States.

PRELIMINARY.

§61. States are facts, and their origin and extinction are facts or events in state life, just as the birth of an individual is a fact in his life. This is so apparent in municipal life as to cause no difficulty. In international relations, however, the facts as to the extinction and origin of states have been involved in a great deal of unnecessary obscurity. We shall point out the distinction between the existence of the state as such and its participation in international life. There is also a difficulty caused by the double use of the word "state": (A) as meaning the community as a whole, (B) as meaning the government of the state, so that it is not always easy to tell which meaning the writer has in mind.¹³ We must also clearly distinguish a transfer of territory between states, leaving the parties to the transfer in the same international position as before.¹⁴

DISTINCTION BETWEEN INTERNATIONAL CHANGE AND CHANGE IN FACT.

§62. A state may have an origin or existence in fact and disappear without ever appearing in international life.¹⁵ There is a sharp distinction between international appearance and disappearance and origin or termination of state life in fact.¹⁶ A state must be in exist-

¹² 1 Oppenheim, *Int. L.*, 2 ed. (1912) 174 et seq.; Vattel, (1758) Chitty's *Trans.* Book II. §§35-48; See §519, post, on a member of state damaging interest of a foreign state.

¹³ See §55, ante, on distinction between a state and its government.

¹⁴ See §239 et seq, post, on transfer of state territory. The case of the annexation of Porto Rico and the Philippine Islands by United States cited by Hershey, *Int. L.*, (1912) 129n³, under heading of "extinction of states," is not a point as these were cases of a transfer of state territory.

¹⁵ A state may exist as such, be independent, be a member of the family of nations, as to which see §80, post, and all of which must be clearly distinguished.

¹⁶ Some writers fail to distinguish the separability of the international life of a state, and appear to think that loss of international function extinguishes the fact of statehood, e. g.—Hershey, *Int. L.*, (1912) 104n¹⁴, where he says Canada and Australia are not states, and, 109, n.²⁰, where he says Andorra is not a state. See also p. 129. Twiss, *L. of Nations, Peace*, (2 ed. 1884), 18,

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ence as such before there can be any question of the international appearance of the state. An international lawyer is only concerned with the question whether a given state exists in international life and is performing international functions, and with the effect, if any, caused by the appearance and disappearance of states on the international horizon. The distinction in many cases between the international appearance and disappearance of a state, its origin and extinction in fact, is so close that it is not feasible to arrange the discussion accordingly, and both, therefore, will be considered together.

ORIGIN OF A STATE: INTERNATIONAL AND IN FACT.

§63. Since a state consists of a body of people exercising the power of the organization from within, we must consider the origin of these various elements,—the people, the organization, the power, the exertion of the power.¹ The origin of peoples may be traced back through successive changes until lost in the obscurity of prehistoric times. The existing state organizations may be in a particular case definitely traced.² It is only necessary for our study to describe the history of the existing organizations during recent times, since we are dealing with the conduct of these bodies and we are not

19, says that the international life of a state may determine by its own will without sanction of other states, but that international appearance requires a recognition of other states, instancing the admission of Texas into the United States of America as not being the concern of any other state, as was the revolution of the Spanish Colonies in South America. Hall, *Int. Law*, 6 ed. (1909) 82, says the commencement of a state dates from its recognition by other powers, which is an error. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 121, 125, says that most changes in states are indifferent from an international point of view; that the only changes affecting their international character are—entering into a real union, becoming a dependent state, becoming a neutralized state.

¹ See §18, ante, on the state.

² Examples of international origin of states: (a) States which have appeared on the international horizon by a body of men separating from an older community and setting up a state for themselves. E. g.—Venetia, Sicily, Liberia, Congo Free State. "The Origin of the Congo Free State Considered from the Standpoint of International Law," Jesse S. Reeves, 3 *Amer. J. Int. Law*, 99 et seq. In the case of the Archipelago of Spitzbergen, we have such a state growing up before our eyes. See discussion by Robert Lansing, 11 *Amer. J. Int. Law*, 763 et seq.; Vattel, (1758) Chitty's Trans. Book II. §96. (b) States which have arisen by revolution from a parent state, e. g.—Swiss Cantons, Dutch Republic, United States of America, Greece, South

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American Republics, Panama, Belgium. (c) States, some of which are included under (b) which have been formed by a union of other states, e. g.—United States of America, Italy. In the case of Italy, there is a question of fact whether the King of Sardinia absorbed the other Italian states, and as thus enlarged constituted the Kingdom of Italy, or whether Sardinia and the other Italian states joined together in forming a new state of the Kingdom of Italy into which they merged themselves. For reference to the discussion, see Crandall, *Treaties*, 2 ed. (1916) 427n. "In 1859 an insurrection broke out in that part of the Pope's dominions known as the Romagna or the Legations. Sardinian troops entered the territory and encouraged the inhabitants in their resistance. The Sardinian Government nominated an Extraordinary Commissioner in Romagna, alleging that it was to prevent the national movement from leading to disorder. The late Cardinal Antonelli addressed a circular to the foreign Courts, declaring this act to be not only a violation of neutrality, but in reality an active co-operation with the rebels on the part of the Sardinian Government. The late Emperor Napoleon, writing to the Pope, December 31, 1859, declared that 'the Powers cannot disown the incontestable rights of the Holy See to the Legations.' On the other hand, the assembly of the Romagna formally cast off their allegiance to the Pope, asserting that, having in former centuries lived under their own statutes and laws, and in the beginning of the present century formed part of a civil kingdom, they were in 1815 placed under the temporal government of the Pope against their will; that they considered the government incompatible with Italian nationality, with civil equality and political liberty;

that it had de facto abdicated its sovereignty by giving up its noblest prerogatives into the hands of Austrian generals, who for many years had held the civil and military governments of these provinces; and that the temporal government of the Pope was substantially and historically distinct from the spiritual government of the Church, which they would always respect. In 1870, Signor Lanza and his colleagues persuaded King Victor Emmanuel to occupy Rome, and on September 20 of that year a considerable Italian army appeared before the Gates of Rome, under the pretext of affording protection to Pius IX. against revolutionary attacks. The Pope only made a formal resistance. After the ceremony of a plebiscite, or popular vote, Rome was declared part of the kingdom of Italy;" 1 Halleck, *Int. L.*, 4 ed. (1908) 95n³. (d) States brought into international life particularly by assistance of other states. E. g.—Rumania, Servia, " . . . the incorporation of the Seven United Provinces and the Austrian Low Countries, by the treaties of Vienna under the Prince of Orange, as King of the Netherlands, was the union of two distinct sovereignties, forming a single new sovereign State. By the incorporation of Wales, Scotland and Ireland into Great Britain, and of Normandy and Brittany into France, these incorporated States lost their existence as distinct and substantive political bodies;" 1 Halleck, *Int. L.*, 4 ed. (1908) 95. Sir James Brooke, in 1841 acquired "Sarawak in North Borneo, and established an independent State there, of which he became the Sovereign." "Sarawak is under English protectorate, but the successor of Sir James Brooke is still recognized as Sovereign;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 282, n.³.

concerned except historically with the conduct of any other bodies. The community life of man goes back so far in history, no doubt further even than man in the lowest stages of development in which he has ever been found, that we cannot conceive of any group of individuals appearing without having previously broken off from one or more already existing groups. That process may involve either the complete dissolution of one or more of the older groups or it will have no effect on the older group at all, an important distinction in fact for the groups, but of no importance from our point of view.

Every state, therefore originates as a group of individuals separating from an already existing group. Its growth is very much like that of some of the lowest forms of animal life which propagate by division. If it were possible to assume that man sprang from one original community and that all other communities have originated from that in the manner we have outlined, then we would have to discuss the origin of that particular state, which would probably be found to be of slow, unconscious growth. No such assumption, however, seems possible in the light of our present knowledge.³ A state, therefore, originates in fact by the action of a community of men, conscious or unconscious. This will occur whenever such a community has an opportunity to develop and assert its own inherent force without external restraint. The principal example of this in history is where a body of men settle in a country where there is no state, or conquer some other community and extinguish the state already existing there. A state may also be set up in a particular community by the aid of external power, and furthermore, a body of men within an existing state may revolt and set up a new state.⁴ These instances exhaust the only possible examples of the origin of a

³ Some writers, e. g.—Twiss, *L. of Nations, Peace*, 2 ed. (1884) 185, say two or more nations have a right to unite themselves into another nation, provided they are not governed by views prejudicial to the other nation; obviously using the word "right" in the sense of power, in which case the qualification as to prejudicial views is beside the point. The question is whether the union, in the absence of any external restraint, is for the benefit of the peoples concerned.

⁴ In replacing the old state by revolt, the revolting community may occupy only a part of the territory. The case may possibly occur where the whole state is displaced and a new one set up. Most of such cases, however, are merely changes in form of government and not a change in the state. It is a difficult matter in fact sometimes to determine when the state is changed and when the government is changed.

state. The origin of the independent state, of course, dates from the time of its independence, and is entirely apart from its origin as a state.⁴

EXTINCTION OF A STATE: INTERNATIONAL AND IN FACT.

§64. A state may become extinct in fact as a state,⁵ and it may while still enjoying state life be excluded from international affairs and become extinct as an independent state, in other words, may lose its independence. The distinction between the two is of importance. A state rarely becomes extinguished, and most cases of apparent extinction are instances of merger into or subjection to another state, or changes in or temporary extinction of the government.⁷ If the members of the state are all destroyed, as by an earthquake, the state comes to an end in fact. The state cannot survive the members but the members can survive the state. The extinction of a government, as in the case of anarchy, is usually only temporary and rarely affects the life of the state.⁸

A state will cease to exist in international life when it becomes dependent on another independent state, or, as it is said, is merged in another state, which may be voluntary or involuntary, and may be brought about by a treaty of union or the exertion of force, both of which have, so far as we are concerned, the same significance. This dependence may take any form, from complete merger to the loosest kind of an association, with which the international lawyer has no

⁴ Hall, *Int. Law* 6 ed. (1909) 82, says Liberia was artificially formed upon territory not properly belonging to any civilized power, and (on p. 88) discusses the formation of Congo Free State, which he calls a case of abnormal birth. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 135, says a union of confederated states is not a state, but merely an international confederation of states. It is not a union of confederate states, but a union of states forming a confederation and the confederation does not precede the union. The question whether there is a state is a question of fact to be determined from an examination of the terms of the union and an inspection of the body thereby created. It is as impos-

sible to draw a hard and fast line as it is to fix the definite moment when a child becomes a man.

⁵ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 124, draws a distinction between practical and theoretical extinction of a state which it is difficult to understand. One might as well talk about the practical and theoretical death of an individual.

⁷ E. g.—Poland. The partition of Poland destroyed the Polish government and the Polish state, and left the Polish people divided among several independent states. This is one of the rare cases of the extinction of a state.

⁸ See §68, post, on continuity of a state.

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concern except to ascertain the international disability of the state.⁹ The small states of Europe which were for many years the footballs of European politics, were generally, perhaps always, passed around as entities, and their separate existence preserved. The merger of a state with another may be complete so that one loses its identity or, as is usually the case, may be a subordination of one state to another and a withdrawal of the former from international life.¹⁰

Effect of International Appearance and Disappearance of a State.

PRELIMINARY.

§65. The international lawyer is concerned in many ways with the effect of the international appearance and disappearance of a state, of which we may distinguish two cases: the international

⁹ This merger may be voluntary or forcible, and may be of different degrees, from a complete extinction of the whole of a state to a loose union among two or more states.

(1) Complete loss of identity—dis-memberment.

(2) Retention of identity and complete subordination as a lawful unit of the state.

(3) Union of several states of equal degree to form a new international body.

(a) Confederacy

(b) Federation

(c) Union.

¹⁰ Examples of international extinction of states:

(a) Merger: Wales, Scotland and Ireland into Great Britain. Normandy and Brittany into France. Congo Free State into Belgium. Navarre into Spain. Burgundy into France. 1795—Duchy of Courland into Russia. 1850—Principalities of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen into Prussia. 1908—Congo Free State

into Belgium. 1910—Korea into Japan; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 125.

(b) Conquest and merger: Poland by Austria, Prussia and Russia. Venetia driven from international life by superior force in 1792. 1866—Schleswig-Holstein and Hanover into Prussia. 1870—Alsace and Lorraine into the German Empire. 1901—Orange Free State and South African Republic into Great Britain. (c) Voluntary union: Thirteen United American Colonies into the Federal Union of the United States of America. As by disappearance of Italian states into the Kingdom of Italy, see §63n², ante. Republic of Valais and Principality of Neuchâtel into Helvetic Union; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 18. (d) Extinction of the Holy See. (e) Breaking up of a state into several parts: Kingdom of Netherlands in 1831, divided into Holland and Belgium. 1833—Division of Swiss Cantons, of Basle into Basel Stadt and Basel Land; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 125.

effect, that is, the effect on the state in its relation with other independent states; the internal effect, which is the effect on the municipal law¹¹ and the members of the state.¹² We must distinguish the transfer of state territory from one state to another, in which the states retain their international aspect notwithstanding a change in territorial extent.¹³ The case under discussion may involve an apparent transfer of state territory, but the transferring state goes with the territory. We shall discuss (A) international effect, (B) internal effect.

INTERNATIONAL EFFECT OF APPEARANCE AND DISAPPEARANCE ON INTERNATIONAL HORIZON.

§66. The appearance and disappearance of a state in international life will affect treaties with other states,¹⁴ intercourse,¹⁵ territory,¹ obligation if any existing apart from treaty,² and will involve the question of recognition,³ and effect on members of the state.⁴ All of these are discussed more appropriately under the several headings referred to in the notes. We must distinguish between appearance and disappearance. Where a new independent state appears, it is like a new piece lately coined from the mint and put into circulation for the first time, or a newly born babe entirely innocent and free of any incidents of international relations. If a state is ushered into international life, as was Belgium with the assistance of the great powers, it may be compelled to accept the limitations imposed by those who assisted it in its birth. Where, however, the state comes into the international world *proprio vigore*, as did the United States of America, it is free of any limitation whatever imposed by external political power of other states. A disappearance involves the state into which the former state disappears, and if the obligations of the disappearing state are involved, there must be an arrangement with the other independent powers affected by the disappearance, and usually the state into which the disappearance takes place is willing to assume the burden of sustaining any external obligations to other states.

¹¹ See §125, post, on definition of municipal law.

¹² See §430n², post, on definition of member of a state.

¹³ See §239 et seq, post, on transfer of state territory.

¹⁴ See §391 et seq., post.

¹⁵ See §199, post.

¹ See §253, post.

² See §457, post.

³ See §85, post.

⁴ See §434, post.

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Effect of Change

INTERNAL EFFECT OF INTERNATIONAL APPEARANCE AND
DISAPPEARANCE.

§67. The internal effect of the international appearance or disappearance of a state depends entirely on the action of the states concerned. Questions will arise concerning municipal law, local political institutions, most of which are entirely immaterial to the international lawyer. So also questions are involved of the state membership of inhabitants of the state in question.⁵ These will be referred to at the proper place.

CONTINUITY OF A STATE.

§68. Since a state is a body of people exercising its power from within, it follows that it can only be extinguished as a state by the destruction of the people or by destruction of the inherent power of the government. A state, therefore, will survive many of the ordinary events in international life, as changes in the government, changes of location, changes in individual membership, international appearance or disappearance, and territorial changes. This is usually expressed in the books by the phrase "the continuity of a state."⁶ More accurately worded, the proposition is that a state is a living organism having such vitality and inherent force that it is rarely affected by the events of international life.⁷

⁵ See §434, post, on international changes in membership.

⁶ Some writers, e. g.—Twiss, *L. of Nations, Peace*, 2 ed. (1884) 18, speak of the continuity of the external life of the state, apparently meaning the continuity of the government, which is quite different from that of the state. Confer, *ibid.* 20, 21, and see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 121–123. Sometimes called the "identity" of a state. Hall, *Int. Law* 6 ed. (1909) 21, 22; 1 Halleck, *Int. L.*, 4 ed. (1908) 80; Hershey, *Int. L.*, (1912) 125 et seq.; 1 Moore, *Dig. of Int. L.*, (1906) 248–254; Wheaton, *Elements*, Dana's ed. (1866) 33.

⁷ In the following cases the territorial changes indicated had no effect on the continuity of the state: Prussia, after the peace of Tilsit, in 1807, lost nearly

one-third of her territory; Savoy, by the congress of Vienna, was reduced one-half; France, in 1815 and 1871, lost territory; Turkey, in 1829 and 1878, lost territory; Austria, in 1859, lost Lombardy, and, in 1866, lost Venetia; 1 Moore, *Dig. of Int. L.*, (1906) 248. 1859–61, "Sardinia acquired whole territory of the Italian Peninsula and turned into the Great Power of Italy," yet remained the same international person. 1 Oppenheim, *Int. L.*, 2 ed. (1912) 123. See §63n², ante, and Hall, *Int. Law*, 6 ed. (1909) 21n². France during the 19th century changed its government several times and acquired and lost territory. Vattel, (1758) Chitty's *Trans. Book I. §14*, is in error when he says that when an end is put to the political association the nation or

Succession of States.

PRELIMINARY.

§69. A theory of succession of states has been advanced⁸ in connection with the international changes in state life, which theory requires some attention although not strictly germane to the title of the chapter as it is not a fact in international life.⁹ The theory of succession appears to have been invented by the Roman law to explain the legal consequences of certain facts, to-wit, the death of an individual.¹⁰ A., having certain interests in objects around him, dies.

state no longer exists. "The Legion, the Roman jurist said, is the same though members of it are changed; the Ship is the same though the planks of it are renewed; the Individual is the same though the particles of his body may not be the same in his youth as in his old age." 1 Phillimore, Int. L., 3 ed. (1879-1883) 203. See Grotius, Belli. ac. Pacis (1625), Whewell's Trans. II. IX. III.-X. Continuity of a state not affected by national emigration to a new country. This is only the case of a moving state. 1 Wildman, Int. L., (1849) 68; Zouche, L. of Nations (1650), Carnegie ed., Part II. II. 8. Some writers, however, think that a state is not the same after a change in government. Zouche, L. of Nations (1650), Carnegie ed., Part II. II. 7.

⁸ Westlake, Int. L., 2 ed. (1910) Vol. 1, 69 et seq., discusses the subject under the heading of the effect of state succession on the allegiance and nationality of the persons inhabiting the acquired territory or in one way or another connected with it. He says (p. 74) that it is generally agreed that the rules of state succession as affecting the right to things and other civil rights are the same in the case of the extinction of the state as in the case of a partial cession of territory. (He means cession of part of the territory.)

New states succeeding to assets of old states called active succession. Passive succession means stepping into liability. Ibid. 1.75.

⁹ The effect of the succession of states will be considered under the following headings:

- (a) relation to other independent states, intercourse.
- (b) treaties.
- (c) obligations of aliens.
- (d) indebtedness of state to other states to alien citizens
- (e) on succession to proprietary rights of state.
- (f) on inhabitants of territory
- (g) on municipal law.

¹⁰ "A universal succession is a succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights;" Maine, Ancient Law, 3 Amer. ed. (1888) 174. See Lawrence, Int. Law, 5 ed. (1913) 92; 1 Westlake, Int. L., 2 ed. (1910) 69. "When one State takes the place of another, and undertakes a permanent exercise of its sovereign territorial rights and powers, there is said to be a succession of States;" Hershey, Int. L., (1912) 130. "A succession of International Persons occurs when one or more International

Some of these interests necessarily perish with him; other interests will remain. If he had an interest in a piece of land, the piece of land is still there. Now the question is, what became of the interest in the land? The party who formerly held it is dead. Other persons now have an interest in that land as his heirs or his creditors. Now is the interest of the heir in the land a new interest created in some way or does the interest which B. had in the land pass in some mysterious manner on B.'s death to the heir? The Roman theory evidently was that the person of the deceased was continued in his heir.¹¹

The theory has been much discussed by the writers, but no very clear conception can be derived from them. Let us first analyze the facts which occur.¹² The living organism known as the state rarely dies and may survive any international change or any change in government. As among states, therefore, apart from the international aspect, questions of succession will almost never occur. The only questions with which we must deal are (A) succession as between governments of the same state, (B) succession between states con-

Persons take the place of another International Person, in consequence of certain changes in the latter's condition;" 1 Oppenheim, Int. L., 2 ed. (1912) 125. "By state succession is meant the substitution of one state for another, the successor continuing to enjoy the rights and discharge the obligations of its predecessor;" Lawrence, Int. Law, 5 ed. (1913) 92. The statement by Hall, Int. Law, 6 ed. (1909), 99, that when a state ceases to exist by absorption, the absorbing state is the inheritor of all local rights, etc. is improper.

¹¹ For a discussion of a succession of states and reference to authorities, see Hershey, Int. L., (1912) 141n²⁷; 1 Oppenheim, Int. L., 2 ed. (1912) 126; 1 Westlake, Int. L., 2 ed. (1910) 68, et seq. "The notion of succession is a general one in law, and belongs exclusively neither to private nor to public law. Succession is substitution plus continuation. The successor steps into the place of the predecessor and continues his rights and obligations; so far

the successions of private and public law agree. But we now have to distinguish between those kinds of succession. A civil successor who steps into the place of his predecessor steps into his rights and obligations as though he were himself the predecessor. That is the universal succession of private law in the Roman sense, at least according to the prevailing doctrine. But the successor of international law steps into the rights and obligations of his predecessor as though they were his own. . . . State succession is substitution plus continuation *quoad jura*, not *quoad defunctum*." Max Huber, quoted 1 Westlake, Int. L., 2 ed. (1910) 69. Hershey, Int. L., (1912) 130, appears to use universal succession as meaning a total absorption of the state, and a partial succession as meaning a partial absorption.

¹² Lawrence, Int. Law, 5 ed. (1913) 92, seems to think that the theory of state succession is inapplicable in international law. His remarks, however, are not clear.

cerned in an international change. Cases of transfer of state territory are to be distinguished because there is no change of the state parties themselves only a transfer of part of the territory of one to the other, the two states remaining in their international aspect the same after as before the transfer. These distinctions are not made by the writers and their failure to do so contributes in large part to the confusion which involves the subject.

SUCCESSION AS BETWEEN GOVERNMENTS OF A STATE.

§70. Two cases will occur of succession between governments of a state (A) where one government succeeds another without affecting the international status of the state, (B) where the change in government involves a change in the international status of the state, which will be discussed in the next section. The typical instance of changes in government without affecting the international status occurred in France in the 18th and 19th centuries. The old monarchy disappeared with the French Revolution, and several successive governments followed. France as a state was unaffected, her international status was the same throughout these changes. Since the government is the agent of the state and the organ by which an independent state maintains its contact with international state life, it follows that there was merely a change in those organs which was entirely a matter of municipal law. Each new organ in fact exercised all the power of the state and became, as it began to function, subject to all international factors of conduct, as they were then existing, and hence represented the state as a jural international person. Every proposition of international law good for the first republic would be equally applicable, assuming that there was no change in international law, to the government of Napoleon or any subsequent government. It only remains to consider how far any cause of action existing against the state at another time will be enforced against a successive government, as for instance, the claim of an alien for an indemnity for damages.¹³

¹³ See §457, post. Government of Louis XVIII. and Louis Phillippe, so far as possible, indemnified citizens of foreign states for loss caused by government of Napoleon. Moore, International Arbitration, Vol. 5, 4447, 4862. King of two Sicilies compensated citizens of United States for damages caused by wrongful acts of Murat.

Moore, International Arbitration, Vol. 5, 4575. Changes in government also occur in the case of a change of a party or faction in control of the government. In this case there is no change in the structure of the political person or in the international aspect, and the matter belongs exclusively to the municipal law.

§71

Succession between States

When an insurgent government is defeated, the parent government is entitled to all the public property of the former. It is sometimes said that there is a succession of the parent state. It is sufficient, however, to rest the case on the circumstance that the two governments were enemies and one of them overcoming the other is by superior and successful force able to take the property of the vanquished state. As between the two governments, and as respects matters within the jurisdiction, there is no difficulty. When, however, the property in question is situate in the jurisdiction of a third state, the question arises as to how far the third state or its courts will recognize the title of the conquering parent state.¹⁴

SUCCESSION BETWEEN INDEPENDENT STATES.

§71. Where a state appears in or disappears from international life, a somewhat different question occurs, and there is a slight distinction between appearance and disappearance.¹⁵ It is clear, in the first place, that the changes with which we are concerned are only the changes in international functions, and are not necessarily permanent as are the analogous cases of the death of an individual in municipal law. A more striking analogy is to suppose the case of a club of individuals, the membership in which is constantly changing and members joining, resigning and rejoining, and to assume that we are dealing with the case of the club duties of these individuals, and with nothing else, and therefore, when a new member joins, we are concerned not with his status as an individual before he joined, but

¹⁴ This principle was recognized by foreign governments in the suits which the United States of America maintained to recover the public property of the Confederate States in foreign jurisdictions; 1 Moore, Dig. of Int. L., (1906) 64 et seq. In like manner, Russia claimed the property of the suppressed Polish insurgent government of 1863, which claim was acquiesced in by the United States; 1 Moore, Dig. Int. L., (1906) 66.

¹⁵ We may illustrate, for the purpose of discussing succession, by the following table, the methods in which new states arise:

- | | |
|--|--|
| <p>(1) By occupation and the settlement of no state territory.</p> | <p>(2) By conquest of territory of another state, displacing the other state.</p> |
| <p>(3) By breaking off from another state leaving the old state intact as a state.</p> | <p>(4) By breaking off from an old state and destroying the old state in the process.</p> |
| <p>(5) By several new states merging and forming a new state. The several states disappear, more or less, from international life, and a new state never before known to exist makes its appearance.</p> | <p>(6) By disappearance of a state, where one state merges with another state or the two states merge together and form a new state.</p> |

with the functions which he then assumes. Now how can any theory of succession be applied as between such bodies?¹⁶

State Act.

NATURE AND DEFINITION OF.

§72. Since we are discussing the conduct of states, it is necessary to define a state act because conduct consists of acts.¹ The act of a state is a manifestation of a purpose of the state through its government as determined by municipal law. The executive is generally

¹⁶ Let us, for instance, look at the case of the partition of Poland. Poland as an independent state disappeared. Austria, Russia and Prussia divided the territory of the Poles among themselves. These three states, however, existed in international life before the division. Now, can it be argued upon any possible ground that by the acquisition of the dismembered Polish state these three states exercise any greater international function? Suppose the international activity of a state is one hundred per cent. Can it be said that this one hundred per cent was greater in the case of these three states after the acquisition than before? It does not seem possible to argue that it was because these three independent states, as independent states, exercised every possible power that an independent state could exercise, before Poland was divided, and they could not obviously exercise any greater functions thereafter. The only aspect of the case to which the theory of succession is applicable is as to the particular Polish territory which was seized by the respective states. The theory of succession is also here inapplicable because the conveyance was a conveyance by act of the party. Thus if A. conveys Blackacre to B., it would be utterly useless to argue there would be any succession between A. and B.

So also it would be as far from the point to suppose there was a succession of any kind between the several parts of the Polish territory and Austria, Russia and Prussia, as the case might be. Suppose a state arises, as did Venice and Sicily, by occupation of territory by settlers, or the case of Liberia in more recent times, which is exactly a similar state of facts. These states gradually appeared on the international horizon. What succession was there between them and any other state? None. And when finally, in 1793, Venetia was extinguished by a superior force of other states as an independent state, what succession occurred? It is believed in this case also there was none. The title of a conquering state to the jurisdiction and territory of the conquered state depends on capture by superior forces, in which case there is no idea of succession involved. Arthur B. Keith, "Theory of Succession," 1907. As to succession of international persons, see 1 Oppenheim, Int. L., 2 ed. (1912) 125 et seq. See §830, post.

¹ The external acts manifesting the purpose of the state, consist of proclamations, manifestos, statutes, entering into treaties, acts of government officials, and orders to them by the head of the state, sending of diplomatic and other envoys. See Hall,

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Individual Act Distinguished

the head of the state, and, in the case of autocracies, his act was the state act. The act of state may be an act relating to the municipal life of the state, or it may be an exercise of the power of the state with respect to external affairs, that is, in international life. The state may therefore act internationally or municipally. It leads a dual life, as it were. Our concern is with the international acts affecting international relations. The purpose of the state is the purpose of the heads of the government, which may be their own purpose or the purpose of the people. A distinction is to be drawn between the acts of an independent state which, appearing in international life, are subject to international factors influencing conduct, although acting under influence of another state, and acts of dependent state subject to an independent state.²

DISTINCTION BETWEEN ACT OF INDIVIDUAL AND STATE ACT.

§73. An individual acting on behalf of the state, as an officer, or an individual whose act is ratified and adopted by the state as its act, loses his individual status with respect to such act. No individual can assume of his own motion the performance of a state act. The question of what is a state act is determined by municipal law or the attitude of the state in question. Since an independent state is not subject to municipal law, the person performing a state act is removed from the cognizance of the municipal law by reason of the fact that he acts on behalf of an independent state. So an individual, who takes life or destroys property while acting as an officer of a government, is not liable to a municipal court. This case may arise either where he performs the acts in his own country or in a

Int. Law, 6 ed. (1909) 5, 7. Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 536, says international transaction is the term for every state act of intercourse with another state and distinguishes negotiation, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war and subjugation, in which classification, however, he introduces particular instances of state acts and makes the classification too voluminous. It is also faulty as designating bilateral and unilateral transactions as acts.

² 1809-10. American vessels were confiscated in Dutch ports. An arbitration commission held France liable on ground that Holland was really a dependent kingdom of France and acting under French Imperial decree; 5 Moore, Int. Arb., 4473. 1809-11, American vessels were seized and condemned by the Danes acting under decrees practically dictated by Napoleon. Claims were finally settled against Denmark as an independent state; 5 Moore, Int. Arb., 4549-4573.

Limitations on State Act

§74

foreign country, in which latter case, the remedy is against the state, although opinion has been expressed to the contrary.³ The state will either disavow the act and surrender the officer up for punishment to the municipal court or punish him itself.⁴

LIMITATIONS ON STATE ACT.

§74. There are certain limitations on state acts which do not obtain in municipal law. A state cannot act outside its jurisdiction without invading the jurisdiction of another state except on the high sea or in the territory of no state. The principal part of the surface of the earth is apportioned among independent states, and consequently the freedom of action of any state outside its jurisdiction is very much circumscribed. Almost the entire earth is divided, as it were, into compartments, each containing an independent state and separated by walls from other states, each state being confined within its own particular space. This circumstance makes it necessary for states to act with great circumspection in order to avoid treading on one another's toes. We may regard each state as an atom and the individual members of a state as molecules, circulating within and constantly pressing against the walls in the endeavor to circulate into the other atoms. Civilization and commerce have bored holes in the walls of these compartments so that

³ 2 Moore, Dig. of Int. L., (1906) 27, 28.

⁴ Hernandez, chieftan of a successful revolutionary government in Venezuela, committed certain acts of oppression against an American citizen, Underhill. Hernandez being subsequently in the United States, was sued in the United States courts by Underhill for damages. Underhill failed to recover as the court held that the acts of the defendant were the acts of the government of Venezuela, and not properly the subject of adjudication in the courts of this country. *Underhill v. Hernandez*, 168 U. S. 250 (1897). 1841—McLeod, acting on behalf of the British government, entered the territory of the United States of America, burning the steamer "Caroline" and murdering American citizens. The

British Government assumed responsibility for the act. It was held he was liable to the criminal law of the New York courts, but a verdict of "Not guilty" was rendered, which settled the question; 1 Halleck, Int. L., 4 ed. (1908) 511-516; 2 Moore, Dig. of Int. L., (1906) 24-30. Woolsey, Int. L., 6 ed. (1897) 38n^o, points out that in the case of McLeod, when Great Britain assumed responsibility for the act committed by him the matter became one of international cognizance, and that the federal government could not force New York State, within whose jurisdiction he was, to give him up, in consequence of which Congress (1842) passed a law giving the courts of the United States jurisdiction where a foreign government assumes the responsibility of a crime.

§§75, 76, 77

Effect of State Act

these molecules are circulating with greater and greater freedom amongst the various compartments. This freedom of individual circulation tends to remove the pressure against the walls of the compartments and thus reduces the causes of international explosions.⁵

INTERNATIONAL EFFECT OF STATE ACT.

§75. Every state act tends to have an international effect, in so far as the act has to do with other states, as affecting the interests of other states or the interests of members of other states. These various acts will be referred to from time to time in the discussion and form the principal part of the treatise.

MUNICIPAL EFFECT OF STATE ACT.

§76. Every state act will have an internal or municipal effect, an effect upon the members of the state and the various subordinate organs or members of the state. The question as to the effect of the state act in such case is regulated by the municipal law. Other independent states are entitled to take the state act at its international face value and disregard any internal aspect thereof.

The Community of Independent States or Family of Nations.

PRELIMINARY.

§77. These independent states of the world form a community whose association primarily arises from the circumstance that they exist together on the same planet.⁶ From this point of view, all independent states of the world are in the same community. There are, however, a number of these states, formerly a much smaller number, which are designated as members of an inner community

⁵ In the United States of America, the terms of the federal union as among the several member states, effectually promote such complete freedom of individual movement from one state to another that the compartments of the several states which exist in theory are practically of no moment whatever. See §428, post, on movement of individuals from one state to another.

⁶ The discussion appears by the following table:

| | |
|--|-----|
| Preliminary discussion of the community..... | §77 |
| History of the community..... | §78 |
| Bond of union between members of..... | §79 |
| Membership in..... | §80 |
| No political organization..... | §81 |

Community of States

§77

called the family of nations, between which a somewhat closer association exists.⁷ The existing independent states of the world are shown in the note.⁸

⁷ Walker, *Man. Int. L.*, (1895) 93, uses the curious phrase "powers of the circle," by which he probably means the members of the family of nations.

⁸TABLE OF INTERNATIONAL PERSONS
EXISTING IN THE WORLD AS OF
AUGUST 1, 1914, WITH DATE OF
APPEARANCE ON INTERNATIONAL
HORIZON SINCE 1648.

(A) Monarchies, absolute or limited:

Afghanistan (1648)
Abyssinia (1648)
Austria (1648)
Belgium (1831)
Bulgaria (1908)
China (1648)
Denmark (1648)
Germany (1648)
Great Britain (1648)
Greece (1830)
Italy (1870)
Japan (1648)
Liechtenstein (1866)
Luxemburg (1648)
Monaco (1648)
Montenegro (1878)
Netherlands (1648)
Norway (1905-1908)
Persia (1648)
Roumania (1878)
Russia (1648)
Servia (1878)
Siam (1648)
Spain (1648)
Sweden (1648)
Turkey (1648)

See Table I Oppenheim, *Int. L.*, 2 ed. (1912) 162, 163. He does not, however, always give the correct titles of the states.

(B) Republics:

Andorra, The Republic of Andorra
(1648)

Argentine Republic, The Argentine Republic (1810)
Bolivia, The Republic of Bolivia (1825)
Brazil, The United States of Brazil (1825)
Chile, The Republic of Chile (1818)
Colombia, The Republic of Colombia (1810)
Costa Rica, The Republic of Costa Rica (1821)
Cuba, The Republic of Cuba (1898)
Ecuador, The Republic of Ecuador (1822)
France, The French Republic (1648)
Guatemala, The Republic of Guatemala (1821)
Haiti, The Republic of Haiti (1804)
Honduras, The Republic of Honduras (1821)
Liberia, The Republic of Liberia (1847)
Mexico, The United States of Mexico (1813)
Nicaragua, The Republic of Nicaragua (1821)
Panama, The Republic of Panama (1909)
Paraguay, The Republic of Paraguay (1811)
Peru, The Republic of Peru (1821)
Portugal, The Republic of Portugal (1648)
San Salvador, The Republic of Salvador (1821)
Santo Domingo, The Dominican Republic (1863)
San Marino, The Republic of San Marino (1648)
Switzerland, The Swiss Confederation (1648)
United States of America (1776)
Uruguay, The Republic of Uruguay (1830)
Venezuela, The United States of Venezuela (1830)

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History Bond of Union

HISTORY OF THE COMMUNITY OF STATES.

§78. We need go no further back than the fall of the Roman Empire in order to trace the history of the community of states. Before that time there was practically one state in the world of civilization, as the European states which have since come into international importance were unknown to the western world, and the states now established on the American continent were undreamed of. The community of states as it exists today grew up out of the fragments of the Roman Empire, and perhaps dates in its most distinct outlines from the close of the Thirty Years War (1648).⁹ When the states of western Europe first fully recognized each other's existence as independent bodies, the independent states then in existence in western Europe were described by the writers as "the family of nations," and that term has remained in use to the present day to describe the states which recognize each other as belonging to the same community.

BOND OF UNION BETWEEN INDEPENDENT STATES.

§79. There is no bond of race, language or blood between the independent states of the world.¹⁰ On the contrary, these characteristics serve to make the states dissimilar and rather draw them apart instead of bringing them together. National jealousy, racial antagonism and the individualistic factors all tend to cause international friction. None of the bonds which unite members in the same community exist except that which unites the members of a community from dwelling together on the same territory, which, as we have

⁹ The history of the family of nations is shown by the following table:

- (1) Independent states, members in 1648, and which have continued in existence to the present time, e. g.—France, Great Britain, Switzerland.
- (2) Other independent states of Europe which have come into existence since 1648, e. g.—Belgium, Italy.
- (3) States outside Europe which were in existence in 1648, but which have been recognized as members since, e. g.—Russia, China, Japan, Turkey.

- (4) Independent states which have come into existence outside Europe since 1648 and been recognized as members of the family, e. g.—United States of America, South American Republics, Liberian Republic. For the states existing in Europe in 1788, see Martens, G., *Law of Nations*, (1788) Cobbett's Trans. I. II. 2.

¹⁰ As to bond of union confer; Hershey, *Int. L.*, (1912) 18; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 30; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 8; Woolsey, *Int. L.*, 6 ed. (1897) 6.

pointed out, is the modern development of a bond of association between men, and has no doubt in the municipal life prepared the minds of men for that greater association between the independent states of the world which we may hope will in time arise. There is, however, a bond arising from international commerce, interchange of ideas, travel, etc., between the members of the various states. The individual life within a state may be compared to the circulation of the blood in the body of an individual, which circulation, furthermore, in the case of states, extends into other states, whereas, in the case of individuals it does not. There is an international circulation growing between the independent states gradually taking up and absorbing the circulation within the municipal life of each state, which general international circulation is the strongest bond of union between the states, and has had, as we shall from time to time point out, a very important influence upon the conduct of independent states.

MEMBERSHIP IN THE COMMUNITY.

§80. Membership in this community, whether the former restricted one of western Europe, or the more extensive one of modern times, is confined to independent states and dependent states having international functions. No government or corporation or body of private individuals can move in international life. It is the most exalted community in the world, the greatest and most exclusive of all societies. The members of this society are the persons of international life, and international life is confined exclusively to them. The distinction between this and the community of men is that membership in the international community is always voluntary, somewhat similar to the membership of a family which in ancient times resulted from the fiction of adoption or blood transfusion. Most individuals come into the community by birth, that is, involuntarily. In this respect the community of states is to be distinguished. This voluntary aspect of the community has misled many writers into supposing that the states before they joined the community were living in that state of nature in which it was supposed man originally lived before he became a member of any community. In the case of man, however, we can find no instance of a man without a community, except sporadically.¹¹ We have, however, in international life the striking phenomena that there are independent

¹¹ See §13, ante.

§80

Membership In

states which are outside the family and existing, internationally speaking, alone.

There is no badge or certificate of membership in its community, no outward formality usually attending the admission of the member. The fact of membership is established by the general sense of the community.¹² Membership does not correspond to the limits of international life as there are and have been independent states not members. Appearance and disappearance on the international horizon is one thing, membership in the community is another.¹³

There are a number of states as to which there is some doubt as to whether they are members of the family of nations. These states may be divided into two classes:¹⁴ those as to which there is some doubt whether they are independent states, that is, whether they occupy any space in the international horizon and, on the other hand, those states which are admittedly independent, but the question is whether they are sufficiently civilized to be admitted into the family of nations.¹

¹² As to admission, see Hall, *Int. Law* 6 ed. (1909) 82 et seq.; Hershey, *Int. L.*, (1912) 115 et seq.; Lawrence, *Int. Law*, 5 ed. (1913) 84-87; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 116, 117; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 9; 1 Westlake, *Int. L.*, 2 ed. (1910) 44.

¹³ RECENT IMPORTANT ADMISSIONS—**Turkey**—By the Treaty of Paris, of March 30, 1856, the great powers invited the Sultan to participate in the advantages of the public law and system of Europe. Hall, *Int. Law* 6 ed. (1909) 40; Manning, *Int. L.*, 2 ed. Amos. (1875) 89n; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 32. **Japan**—Hall, *Int. Law* 6 ed. (1909) 41; Wilson, *Int. L.*, (1910) 25n⁷; 1 Westlake, *Int. L.*, 2 ed. (1910) 45. "The Political Development of Japan, 1867-1909," (1910) George Etsujiro Uyehara. See 8 *Amer. J. Int. Law*, 270. "The Full Recognition of Japan." Being a Detailed Account of the Economic Progress of the Japanese Empire to 1911. (1911)

Robert B. Porter. See 6 *Amer. J. Int. Law*, 1058. **China**—"The International Relations of the Chinese Empire." The Period of Conflict. (1910). H. B. Morse. See 5 *Amer. J. Int. Law*, 852. **Russia**—1 Westlake, *Int. L.*, 2 ed. (1910) 45.

¹⁴ These classes are as follows: (1) states outside the family of nations as to which the question is whether admitted, (2) states included in the family of nations as to which the question is whether they are independent.

¹ Hershey, *Int. L.*, (1912) 97n¹⁸, speaks of certain states (China, Persia, Siam) as incomplete members of the family of nations. It is difficult to see what an incomplete member can be. The more accurate phrase is, the state is not completely a member. The completeness applies to the membership and not to the person. See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 33, 154-156; 1 Westlake, *Int. L.*, 2 ed. (1910) 40.

NO POLITICAL ORGANIZATION OF COMMUNITY OF STATES.

§81. The community of states or family of nations has no political organization.² While it undoubtedly has an inherent power, no suitable way has as yet been devised to exercise that power. Some of the more powerful states have acted together, and when they agree their action is generally accepted by the smaller states. So also there have been a number of congresses or meetings of the representatives of various states in which certain matters have been agreed upon. The principles laid down at these congresses have very little binding effect because there is no political power superior to any state to enforce them. It is, however, probable that these various congresses and the joint action of the great powers are the embryo beginnings of a political organization of some kind which may at some remote period develop into an organization sufficiently powerful to curb the action of the independent states. This family of nations is now in a state of development as a community from which man as an individual escaped countless ages ago. There is perhaps no case on record of any human society, past or present, which does not exhibit a political organization far in advance of anything to be found in international relations today.

² A number of schemes have been proposed from time to time for such a political organization:

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| <p>1306. Pierre Dubois, in "De Recuperatione Terre Sancte," proposed an alliance between all Christian powers and establishment of a permanent court of arbitration.</p> <p>1461. Antoine Marini proposed a federal state to consist of all Christian states with permanent congress. This scheme adopted by Podiebrad, King of Bohemia (1420-71), and the subject of negotiations with foreign powers.</p> <p>1495. Diet at Worms. Resolved in favor of abolition of private warfare. Declaration of a perpetual peace. Establishment of an imperial court to settle all disputes between states within the empire.</p> | <p>1600. Sully proposed a division of Europe into fifteen states with a federal union. Adopted by Henry IV. of France.</p> <p>1623. Emeric Crucéé proposed the establishment of a union of all states in the world with a general council, etc.</p> <p>1666. Plan of Landgrave of Hesse Rheinfus.</p> <p>1668. Plan of Charles, Duke of Lorraine.</p> <p>1693. Plan of William Penn.</p> <p>1658-1743. Plan of Abbe de St. Pierre. <i>La Pax Perpetuelle.</i></p> <p>1710. Plan of John Bellers.</p> <p>1761. Plan of Rousseau.</p> <p>1789. Plan of Jeremy Bentham.</p> <p>1797. Plan of Immanuel Kant.</p> <p>1840. Wm. Ladd, "An Essay on the Congress of Nations," reprinted by the Carnegie Endowment, Oxford Univ. Press, 1916-1919.</p> |
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Down to the close of the middle ages, the mind of western Europe was fixed on the realization in fact of a world power, a realization which failed of accomplishment because of political, social and economic ignorance of the times, as well as the jealousy, corruption and conflict between the two powers contending over that world supremacy. At the close of the Thirty Years War definite independent political communities appeared in western Europe, and the idea was given up of a world power, and international life became thenceforth concerned with the conflict between those independent powers, a change which has undoubtedly made for the advancement of civilization and the benefit of man. Had Pope or emperor prevailed, the result would probably have been stagnation and decay and finally a breaking-up similar to that occurring at the fall of the Roman Empire. It is clearly recognized by the best thought that an enduring and practical political organization of the independent states of the world is something not only to be ardently longed for but to be brought about by every possible means, and is an organization which will confer such vast benefits upon the human race that no pen today would be able to adequately describe it. That organization,

1919. The Covenant of the League of Nations, being Part I. of the Peace Treaty of Versailles of June 28, 1919.

For a discussion of these projects and general treatment of the subject, see Manning, *Int. L.*, 2 ed. Amos. (1875) 484 et seq.; 2 Lorimer, *Inst.* (1883-4) 83-288. See discussion at the 11th Annual Meeting of the American Society of International Law, Proceedings for 1917, pp. 56-123. "The Society of Free States," by Dwight W. Morrow. "Der Gedanke der Internationalen Organisation in seiner Entwicklung," 1300-1800. By Jacob ter Meulen. The Hague, Nijhoff. 1917. "Das Völkerrecht nach dem Kriege." By Heinrich Lammasch. Publications de l'Institut Nobel norvegien. Vol. III, 218. Reviewed in 19 *Col. Law Rev.*, 258. "Concentration and International Law," Grafton Cushing, 13 *Harv. Law Rev.* 589. "Cosmopolitan Custom and International Law," Fred-

eric Pollock, 29 *Harv. Law Rev.* 565.

"The European Commonwealth: Problems Historical and Diplomatic," (1919) J. A. R. Marriott. "The Society of Nations," (1919) T. J. Lawrence. "A Republic of Nations," (1918) Raleigh C. Minor. "The League of Nations," (1918) Horace M. Kallen. "A League of Nations," (1919) Edith M. Phelps. "The League of Nations," (1919) L. Oppenheim. "League of Nations," (1919) Alfred Owen Crozier. "The League of Nations: its Economic Aspect," (1918) Hartley Withers. "A Confederation of the Nations: Its Powers and Constitution," (1918) Ernest Barker. "The League of Nations: An Historical Argument," (1918) A. F. Pollard. "World Organization as Affected by the Nature of the Modern State," (1911) David Jayne Hill. See 5 *Amer. J. Int. Law*, 1118. "The Great Design of Henry IV." (1909) Edwin D. Mead. See 4 *Amer. J. Int. Law*, 252.

however, must grow up, if history has taught us anything, and if it is to endure, by practical co-operation between those independent states, and must be in the nature of a democratic government, otherwise if it does arise it cannot hope to endure any more than any autocratic power in the past has endured.

Recognition.

PRELIMINARY AND DEFINITION.

§82. Recognition is an outward and visible manifestation of the mental comprehension of an existing fact or state of affairs, and is properly used as applicable to people and things.³ As used in international law, the term "recognition" is confined to those facts which are material in international life. A few definitions are collected in the note, which, however, are too narrow as they confine the term to the recognition of new states, which is only one kind of fact recognized. When a fact is clear in municipal life, it is generally recognized as such. When there is a doubt and the fact is material to a dispute between two individuals of which the political organism will take cognizance, the appropriate organ of the state will determine the fact for the purpose of settling the dispute. Among independent states there is no such tribunal, consequently each state must act on its recognition of any fact, and when the fact is material to a dispute between the states and they cannot agree, the case is the same as any other controversy between these bodies. Some facts are material only between two or more states. Others are of such a nature that they affect the course of international life and are material as between many or all states. Accordingly in these cases we find a considerable amount of formality in the recognition commensurate with the importance and the necessity of the recognition being generally known in the international world.

³ "Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 117. "Thus, although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired"; Hall, *Int. Law* 6 ed. (1909) 82. Lori-

mer, *Inst.* (1883-4) Vol. 1, 93-219, discusses recognition of state existence as a fundamental doctrine of the law of nations, which, it is believed, is erroneous as to doctrine, as recognition is an act and cannot, therefore, be a doctrine. While admissible to speak of the doctrine of original sin, it is entirely inaccurate to speak of the doctrine of birth.

§§83, 84

Facts Recognized

Facts Recognized.**PRELIMINARY.**

§83. The facts in international life which an independent state must recognize as existing are too various for enumeration. The principal ones are as follows: (A) state of war,⁴ (B) state of neutrality,⁵ (C) territorial extent of a state,⁶ (D) membership of an individual in a state,⁷ (E) membership of the state in the family of nations,⁸ (F) changes in state life, origin and extinction of states.⁹ (A), (B), (C) and (D) are sufficiently referred to in the subsequent discussion; (E) has already been discussed. Changes in state life have occasioned the greatest difficulty and will be separately considered under the progressive headings of (A) belligerency and insurgency, (B) new states and independence, (C) new government and title of government. The disappearance of a state from international life causes hardly a ripple. It is only when a new state struggles to raise itself into the international arena that we find any commotion or difficulty.

RECOGNITION OF BELLIGERENCY AND INSURGENCY.

§84. Belligerency and insurgency are facts and the status of belligerent and insurgent communities has already been discussed.¹⁰ The recognition of the fact lies solely in the discretion of the recognizing state and is frequently a matter of some delicacy. The question of recognition depends entirely on how far the recognizing state is affected by the revolt, that is to say, this community which is endeavoring to break forth into international life and crack the shell of the political canopy of the state against which it revolts need only be taken account of by those states which are concerned or affected by the disturbance in the other state.¹¹ The recognition

⁴ See §601, post.⁵ See §674, post.⁶ See §211, post.⁷ See §431, post.⁸ See §80, ante.⁹ See §61, et seq., ante.¹⁰ See §49, ante.

¹¹ The question has been extensively discussed by the writers, frequently, however, as if it were a question of law. See 1 Amer. J. Int. Law 46-60; Hall,

Int. Law, 6 ed. (1909) 83-88; Hershey, Int. L., (1912) 116 et seq.; 1 Lorimer, Inst. (1883-4) 93 et seq.; 1 Moore, Dig. of Int. L., (1906) 164; 2 Phillimore, Int. L., 3 ed. (1879-1888) 20 et seq.; 1 Oppenheim, Int. L., 2 ed. (1912) 113 et seq.; 1 Westlake, Int. L., 2 ed. (1910) 50-57; Woolsey, Int. L., 6 ed. (1897) 40 et seq., 290-296. Lawrence, Int. Law, 5 ed. (1913) 352, says (1) recognition of belligerency is notice by

of belligerency in effect assumes that the revolting body is, for the time being, an independent state existing in international life and entitled to exercise international violence.¹³ The state against which the revolt exists cannot complain because the revolting body has gotten entirely out of hand, which is the fault of the parent state in not having sufficient force to crush it. Some of the cases which have occurred are referred to in the note.¹⁴

RECOGNITION OF NEW STATES AND OF INDEPENDENCE.

§85. There is a distinction, as we have seen, between (A) the birth of a new state, (B) the independence of a state,¹⁴ (C) its member-

third parties of their intention to give the community recognized all the rights of lawful belligerents, (2) insurgency is a condition midway between belligerency and unauthorized violence, (3) puts the case of a revolting fleet, says it cannot be recognized as belligerent as belligerency and territory are inseparably connected. He cites the following cases: 1891—Revolt of the Chilean Fleet. 1894—Revolt of the Brazilian Fleet. Woolsey, *Int. L.*, 6 ed. (1897) 292, says the case of the revolt of the low countries was different because they were states having their special charters not connected with Spain except so far as the King of Spain was their suzerain. The distinction, however, is immaterial. It is utterly unimportant what the nature of the relation formerly was between the revolting and the independent states. "Insurgency and International Maritime Law," George Grafton Wilson, 1 *Amer. J. Int. Law*, 46 et seq. As to recognition by a parent state of the revolted community, see Hall, *Int. Law*, 6 ed. (1909) 82, 83; Wilson, *Int. L.*, (1910) 43.

¹³ See §603, post.

¹⁴ Cuba—Belligerency not recognized by United States of America, 1868–69, and 1895–98. "The Recognition of Cuban Belligerency," J. H. Beale, 9

Harv. Law Rev. 406. Insurgents in Chili in 1891, and Brazil in 1894, while not recognized as belligerents by third powers, were nevertheless given freedom of action; Wilson & Tucker, *Int. L.*, (1901) 58. Hungary—Revolution in 1849. Not recognized as a belligerent by Great Britain or France; 1 Westlake, *Int. L.*, 2 ed. (1910) 51. United States of America sent an agent; Wheaton, *Elements*, Dana's ed. (1866) 45–48. For a collection of the different public acts by which the United States of America recognized the existence of civil war between Spain and her American colonies, see 4 Wheat. U. S. Supr. Ct. Reports, appendix, n. II. Confederate States of America: Hostilities commenced April 12, 1861. Great Britain entered into official communication with the Confederate Commissioners, and, on May 13, 1861, issued a proclamation of neutrality, for text of which see Wilson & Tucker, *Int. L.*, (1901) 60; Wilson, *Int. L.*, (1910) 40n². For discussion, see Hall, *Int. Law*, 6 ed. (1909) 36; 1 Lorimer, *Inst.* (1883–4) 142–147; Walker, *Man. Int. L.*, (1895) 3; Wheaton, *Elements*, Dana's ed. (1866) 37; Woolsey, *Int. L.*, 6 ed. (1897) 293.

¹⁴ Recognition of independence may sometimes be accompanied by guarantee of that independence.

ship in the family of nations. The chief difficulty in international relations is over the recognition of independence, and as that independence is generally contemporaneous with the birth of the state and its admission into the family of nations, the recognition of the three facts is simultaneous, although they may be separated by considerable intervals of time, and (C) does not necessarily follow from (B), nor (B) from (A). A few cases which have occurred are noticed in the note.¹⁵

¹⁵ Belgium: 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 32. Bulgaria, Independence of: See Georges Scelle in *American J. Int. L.*, Vol. 5, 680 et seq., Vol. 6, 86 et seq., 659 et seq. Czechoslovakia: Recognition by United States of America. "The Secretary of State makes the following announcement: 'The Czecho-Slovak peoples having taken up arms against the German and Austria-Hungarian Empires, and having placed organized armies in the field which are waging war against those empires under officers of their own nationality and in accordance with the rules and practices of civilized nations;' and 'The Czecho-Slovaks having, in prosecution of their independent purposes in the present war, confided supreme political authority to the Czecho-Slovak National Council. The Government of the United States recognizes that a state of belligerency exists between the Czecho-Slovaks thus organized and the German and Austro-Hungarian Empires. It also recognizes the Czecho-Slovak National Council as de facto belligerent government, clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks. The Government of the United States further declares that it is prepared to enter formally into relations with the de facto government thus recognized for the purpose of prosecuting the war against the common enemy, the empires of Germany and Austria Hungary'." Confederation of the Rhine: Guarant-

eed and recognized by Prussia by treaty of Tilsit of July 7, 1807. Greece: Recognized by Great Britain in 1825, Turkey remonstrating. For discussion see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 32; 12 *American J. Int. L.*, Supp. 67 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 43. Italy, Kingdom of: 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 32-36. The unification of Italy in 1861. Mecklenburg and Bavaria refused the recognition of Victor Emmanuel as King of Italy, and Count Cavour revoked the exequatur of the consuls of these states in Italy; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 426.

Lithuania recognized on March 24, 1918, by the German Government as follows: "Whereas the Lithuanian National Council, as recognized representatives of the Lithuanian people, on December 11, 1917, declared Lithuania an independent state united with Germany through eternal and close alliances and connections in traffic, monetary and other fields, and asked Germany's protection and help in reconstruction of the state, we hereby recognize Lithuania as free and independent. The German Empire is prepared to lend Lithuania the required help and, in concert with Lithuania's population, to take the necessary measures. Conventions for the re-establishment of confederation with the German Empire will be made. The Imperial Government presupposes that the conventions will be to Germany's interest as well as Lithuania's, and

RECOGNITION OF TITLE AND GOVERNMENT.

§86. Recognition of titles and government is now a matter of course in most cases, the only question being one of fact as to the government adopted by the people of the state or the title adopted by the government. From the close of the Thirty Years War to the beginning of the 19th century, many controversies arose in Europe over questions of title and the jealousy of other sovereigns, and other reasons often prevented a recognition of a new title assumed

Lithuania will take a share of Germany's war burdens, which are promoting Lithuania's emancipation. A formal document of recognition of Lithuania's independence will be forwarded to the National Council." 1903.—Panama revolted from Colombia, and the United States immediately recognized the new republic as an independent state; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 120n¹; Wilson, *Int. L.*, (1910) 30. Portugal revolted in 1640 from Spain. Recognized by Great Britain in 1641, Spain in 1688; Wheaton, *Elements*, Dana's ed. (1866) 42. Spanish colonies in South America recognized by Great Britain in 1825, United States of America in 1822; Hall, *Int. Law*, 6 ed. (1909) 84; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 120; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 29-31; Wheaton, *Elements*, Dana's ed. (1866) 43. "The independence of the South American Republics, a Study in Recognition and Foreign Policy," Frederic L. Paxson, (1903,) see 17 *Harv. Law Rev.* 149. Texas by United States of America in 1836; Wheaton, *Elements*, Dana's ed. (1866) 44. United Netherlands recognized by Spain by treaty of Munster in 1648; Wheaton, *Elements*, Dana's ed. (1866) 42. United States of America, thirteen revolted British colonies in North America recognized by United Netherlands in 1782; France, by treaty of Paris of Feb. 6, 1778, which guaranteed independence of United States of

America; considered *casus belli* by Great Britain; by Great Britain in 1782, treaty of Paris; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 120; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 29; Wheaton, *Elements*, Dana's ed. (1866) 42, 43. Poland, recognition of by United States of America in 1919. Note by Secretary of State as follows: "The President of the United States directs me to extend to you as Prime Minister and Secretary for Foreign Affairs of the Provisional Polish Government his sincere wishes for your success in the high office which you have assumed and his earnest hope that the Government of which you are a part will bring prosperity to the Republic of Poland. It is my privilege to extend to you at this time my personal greetings and officially to assure you that it will be a source of gratification to enter into official relations with you at the earliest opportunity to render to your country such aid as is possible at this time as it enters upon a new cycle of independent life, will be in full accord with that spirit of friendliness which has in the past animated the American people in their relations with your countrymen." The Annex to Article 26, of the Peace Treaty of Versailles of June 28, 1919, provided as original members of the League of Nations signatories of the Treaty of Peace the following: New Independent States: Czecho-Slovakia, Hedjaz, Poland, Serb-Croat-Slovene State.

§87

Act of Recognition

by a potentate. On the whole, but little difficulty has occurred, the question being entirely one of fact. The government is the organ of the state and is usually sufficiently clear, and involves no difficulty in recognition.¹

The Act of Recognition.

PRELIMINARY.

§87. The act of recognition is performed by the government of the state as that is its organ for international relations and cannot be performed by any individual or by the state body as a whole.² In absolute personal governments the function resides in the monarch; in limited governments in such organ of the state as is prescribed by the municipal law. This recognition may be made by one state alone or several states may act together, described as a single or collective recognition.³ The recognition is obviously irrevocable as it relates to an existing fact.⁴ Recognition is sometimes delayed for a long time after the occurrence of the fact when the latter is unpalatable to the recognizing state. This is called deferred recognition.⁵

¹ Martens, G., *Law of Nations*, (1788) Cobbett's Trans. III. II. 7, says that when a prince mounts to the throne, it is customary to notify his accession to all foreign courts and for them to answer by congratulations, and that this occurs even during war, referring to the case in 1719 when, during the war between Russia and Sweden, the Queen of Sweden notified her accession to Peter I., and the latter answered by a congratulatory compliment. 1701—On death of James II. Louis XIV. openly recognized the son of the exiled king as James III. of Great Britain. Isabella, Queen of Spain, who came to the throne as an infant in 1833, not recognized until 1848 by Russia, Austria and Prussia; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 426. 1897, Oct. 12—King of Korea assumed title of Emperor, but United States did not consider it necessary to reaccredit its envoy merely because of the change;

4 Moore, *Dig. of Int. L.*, (1906) 463. See §199, post, on termination of diplomatic mission. See 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 41 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 89; Vattel, (1758) Chitty's Trans. Book II. §§43-44; Wheaton, *Elements*, Dana's, ed. (1866) 236.

² Wilson, *Int. L.*, (1910) 22, says the only states, etc., which international law recognizes in North America are the United States of America. This, it is apprehended, is an error. A state is recognized by the other states of the world as an independent state and not by international law, which cannot recognize anything as it has no volition, will or consciousness.

³ Wilson, *Int. L.*, (1910) 30.

⁴ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 119.

⁵ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 118.

MEANS OF RECOGNITION.

§88. The state act of recognition may be expressed by formal statement or announcement, or implied when the state acts on the assumption that the fact is in existence, that is, the recognition may be express or implied.⁶ Most cases of recognition are implied.

ABSOLUTE AND CONDITIONAL RECOGNITION.

§89. Recognition may be absolute or the state or states recognizing may impose conditions,⁷ and if they do, the performance of the conditions by the state recognized will depend entirely on the operation of the international factors of conduct.

MUNICIPAL EFFECT OF RECOGNITION.

§90. The act of recognition by the state is a political act⁸ of the superior power in the state, and is binding upon all inferior⁹ or subordinate departments and organs of the government and upon all members of the state. All such must consider and recognize the international fact to be as it is or has been recognized by such power, and no averment to the contrary can be heard. This principle is frequently applied in judicial proceedings where the court says it is bound by the act of the head of the state.¹⁰

⁶ 1 Oppenheim, Int. L., 2 ed. (1912) 117. Express recognition, proclamations of belligerency, neutrality, etc. Implied recognition by entering into diplomatic relations, making a treaty, etc.; Hershey, Int. L., (1912) 116; 1 Oppenheim, Int. L., 2 ed. (1912) 117; Wheaton, Elements, Dana's ed. (1866) 346. The Congo Free State adhered to the general act of the African Conference at Berlin. Roumania and Servia created by congresses at which they were not present and by treaties which they did not sign but subsequently actually recognized by accrediting diplomatic agents to them; 1 Westlake, Int. L., 2 ed. (1910) 49. International congresses sometimes admit colonies, and protectorates to positions of inter-

national status.—E. g., Berlin, International Wireless Telegraph Convention of November 3, 1903; Wilson, Int. L., (1910) 36n¹⁸.

⁷ 1 Oppenheim, Int. L., 2 ed. (1912) 118, where he cites the case of the recognition of Bulgaria, Montenegro, Servia and Roumania by the Berlin Congress of 1878, upon condition that they would maintain religious tolerance within their borders.

⁸ Recognition solely an executive function binding on courts. See cases cited Wilson, Int. L., (1910) 27n⁸.

⁹ Vattel, (1758) Chitty's Trans. p. 142n²⁴.

¹⁰ 2 Phillimore, Int. L., 3 ed. (1879-1888) 38.

§91, 92, 93

Equality of States

Equality of States.**PRELIMINARY.**

§91. The question as to the equality of the international independent states of the world has caused some difficulty, and there is considerable obscurity in the writers. The first question is—are they equal in fact? The second is—is there a legal inequality, that is, do the external factors determining international conduct operate equally on all the states?¹¹

INEQUALITY IN FACT.

§92. These organisms which we have called states obviously vary in size and power just as individuals are different in capacity and strength. This is so clear as to require no extended comment, and is referred to either as political inequality or inequality in fact.

BALANCE OF POWER.

§93. The independent states of western Europe have been compelled in self-preservation to combine among themselves, from time to time, in order to prevent any one of their number from acquiring such power as to overshadow the rest, a condition of affairs which, it was foreseen, would terminate in the absorption of the other states by the greater one. An equilibrium, therefore, has been maintained by balancing the powers of the various states against each other, and that equality is sometimes described as the balance of power,¹² which is a fact and not a conception or legal doctrine, as some writers suppose. Numerous different combinations have been effected from

¹¹ The discussion will be arranged under headings shown in the following table:

| | |
|---|-----|
| Preliminary..... | §91 |
| Independent states unequal in fact..... | §92 |
| Balance of power..... | §93 |
| Legal equality..... | §94 |
| Ceremonial equality..... | §95 |

¹² "The meaning of the balance of power is this: that any European state may be restrained from pursuing plans of acquisition, or making preparations looking towards future acquisitions,

which are judged to be hazardous to the independent and national existence of its neighbors;" Woolsey, *Int. L.*, 6 ed. (1897) 45. He then points out that it does not obtain outside of Europe nor apply to sea power, and instances the growth of England, and says that her outside acquisitions do not affect considerations of policy in Europe. "An equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 193.

time to time, and, so far, have been successful in keeping the principal states of the world on a more or less equality of power in fact.¹³ There is a difference of opinion among the writers, some supposing that the balance of power does not exist and is of no importance in modern times.¹⁴ Others take what is believed to be the correct view—that it is of vital importance to the continuance of international life as it exists today.¹⁵

¹³ For history of, see 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 574-614; Woolsey, *Int. L.*, 6 ed. (1897) 45-58; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 193n¹; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 187-190.

¹⁴ The following authorities seem to think that the balance of power does not obtain: Hershey, *Int. L.*, (1912) 151, says that the balance of power is a system based on the idea of an equalization of force, that the system was temporarily destroyed by Napoleon and revived at the Congress of Vienna. [Napoleon did not destroy the system; he temporarily destroyed the balance of power as a fact.] That in the course of the 19th century the idea has developed into that of the concert of Europe. [On the contrary, the concert of Europe was a joint action of states to preserve the balance of power.] Lawrence, *Int. Law*, 5 ed. (1913) 132, 133, 269-279, thinks that the principle of the balance of power has declined in the last hundred years; that in modern times the theory has taken the form of intervention to prevent undue aggression by one state at the instance of another, and the concert of Europe has taken its place [which is nothing more or less than a combination to preserve the balance of power.] Westlake, *Prin. of Int. Law*, (1894) 120, says that the former state of Europe differed from the present owing to certain facts which contributed to make the principle of the balance of power formerly of greater importance. [The more accurate statement, it is submitted, is that there were more facts tending to dis-

turb the balance of power; the maintenance of that balance is as important now as it ever was.] Lorimer, *Inst.* (1883-4) Vol. 1, 44, says the doctrine has been repudiated by history as it always was by reason.

¹⁵ The following authorities have expressed what is believed to be the correct view that the balance of power is still of vital importance: F. R. Coudert, 36 *Amer. Law Reg. & Rev.*, N. S. 369. He says that it is the *fons et origio* of the whole plan of international law. Elihu Root, 10 *Amer. J. Int. Law*, 215; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 193; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 581; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 187; Vattel, (1758) Chitty's *Trans. Book II.* 53, III. 47, 48; Wheaton, *Elements*, Dana's ed. (1866) 92 et seq. See Preamble to the Old British Mutiny Act: "And whereas it is adjudged necessary by His Majesty and this present Parliament that a Body of Forces should be continued for the Safety of the United Kingdom, the Defence of the Possessions of His Majesty's Crown, and the Preservation of the Balance of Power in Europe;" Lawrence, *Int. Law*, 5 ed. (1913) 130n¹. Emperor Napoleon III. put forth the doctrine that whenever another state was greatly aggrandized, France must have territorial compensation, and he obtained in 1860 the cession of Savoy and Nice as compensation for the creation of the Kingdom of Italy but failed to obtain compensation for the unification of North Germany in 1866; Lawrence, *Int. Law*, 5 ed. (1913) 131.

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Equality of States

The existence of the balance of power among independent states today as a fact must not be confused with the question of whether the continuance of that state of affairs is the best thing for humanity, upon which question an international lawyer can express no opinion. There are those who argue that the world was improved and the progress of humanity benefitted by the rise and continued existence of the Roman Empire, and that mankind reaped more benefit than evil from the existence of that power, and that the rise of another such world power at some time in the future is as inevitable as the rising of the sun, and that although that power will inevitably fall, as Rome did, the consequent disorganization, probable stagnation and decay will be more than compensated for by the advance made by man during the continued existence of that power. On the other hand, it is argued that the maintenance of the balance of power is necessary to the future development of international life in a manner which will preserve the spirit of liberty and self-government, and that no world power shall be permitted to arise until the independent states of the world are ready to join in a democratic organization which shall effectually preserve the spirit of personal liberty and freedom of opinion which have so powerfully advanced modern civilization. The answer to these questions involves a consideration of the life of man extending over a greater period of time than is now open to our inspection, and must be left to the philosopher of 100,000 A. D.¹

LEGAL EQUALITY.

§94. The independent states of the world are in fact equal in so far as they are each independent, and, therefore, each theoretically subject to the same factors determining the conduct of independent

¹ The message of President Monroe to Congress on December 2, 1823, was probably not intended to enunciate any principle relative to the maintenance of the balance of power, as the center of international life was then clearly fixed in western Europe. Now that the community of international states embraces nearly the entire world, and the center of international gravity has shifted accordingly, the Monroe doctrine may be regarded as being maintained in the interests of the continued existence of the world balance of power

among independent states. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 198, thinks that the United States of America maintain the Monroe Doctrine in the interests of that world balance of power. Confer as to Monroe Doctrine: 1 Halleck, *Int. L.*, 4 ed. (1908) 92; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 196-199; Wilson, *Int. L.*, (1910) 67; Woolsey, *Int. L.*, 6 ed. (1897) 53 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 97. "Should the Monroe Policy be Modified or Abandoned?" Robert D. Armstrong, 10 *Amer. J. Int. Law*,

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states. International law, therefore, which is a conception of conduct as determined by those factors, applies equally to all these states in theory. In fact, however, we find here even a slight inequality because since one of the external factors consists of pressure from other states, it follows that a weak state is in fact more subject to that external factor as proceeding from a powerful state than the great powers are subject to similar pressure from other states. In theory only, therefore, the states may be said to have legal or any equality. When we examine the operation of the principles of international life more closely, we find that there is even here an inequality which may only be remedied by the erection of a superior political organization which can control the power of independent states. They are equal so far as freedom from external political control is concerned, and therefore legally equal if the word "law" is confined to the factor of external political power.² If, however, the word "law" is used to include all external factors, then there is, as above noted, an inequality.³

CEREMONIAL EQUALITY.

§95. There has, however, been from the earliest times in western Europe a division of the states on the ground of ceremony, some

77 et seq. "The Real Monroe Doctrine," Elihu Root, 8 *Amer. J. Int. Law*, 427 et seq. "Pacific and Asiatic Doctrines Akin to the Monroe Doctrine," Albert Bushnell Hart, 9 *Amer. J. Int. Law*, 862 et seq. "The Monroe Doctrine: An Interpretation." By Albert Bushnell Hart, Boston, 1916. Reviewed in 64 *U. of Pa. L. Rev.* 859, 12 *Amer. J. Int. Law*, 214 et seq. Proceedings American Society of International Law, 8th annual meeting, 1914. "Monroe Doctrine," R. B. Merriman, *Pol. Quarterly*, 1916. Reprint by Oxford University Press. "The Monroe Doctrine," (1919) T. B. Edington. "The Monroe Doctrine: An Obsolete Shibboleth," (1913) Hiram Bingham.

² Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 125 and Wilson, *Int. L.*, (1910) 73 speak of rights of equality.

³ Hershey, *Int. L.*, (1912) 155, says that there is a right to equality before the law but that there is an inequality in fact. However, how can there be a right to legal inequality? See discussion of "Rights," §115, post. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 168, 169, says that there are three important consequences of the legal equality of states: (1) Every state has a right to vote and to one vote. (2) Legally the vote of the weakest has same weight as vote of the strongest. (3) No state can claim jurisdiction over an independent state. Lawrence, *Int. Law*, 5 ed. (1913) 268, 269, says, after referring to the principle of legal equality, that the facts of the modern world are hard to reconcile with the old theory of the complete equality of independent states. "Nations composed of men and considered as so many free persons living

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having precedence over the others.⁴ The Pope was formerly accorded precedence over all, and the emperor came next. This precedence of states has disappeared in modern times, although now the Catholic states give the Pope precedence. States now, however, are divided into states with royal honors and states without, which is simply practically a designation of the large states as having greater precedence. Attempts were made to fix order of precedence but all failed.⁵

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PRELIMINARY DEFINITION AND NATURE OF STATE JURISDICTION.

§96. We have already referred to the power of the state which is exercised through the political organization by the government.⁶ We have therefore two separate facts, a power and the exercise of the

together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference." Vattel, (1758) Chitty's Trans. Prelim. §18. See 1 Oppenheim, Int. L., 2 ed. (1912) 168; Vattel, (1758) Chitty's Trans. Book II. §36; Walker, Man. Int. L., (1895) 11; Wheaton, Elements, Dana's ed. (1866) 232 et seq. "The Theory of the Independence and Equality of States," Philip Marshall Brown, 9 Amer. J. Int. Law, 305 et seq. "The Equality of States and the Hague Conferences," Frederic C. Hicks, 2 Amer. J. Int. Law, 530 et seq.

⁴ (a) The Pope was allowed precedence by the Catholic Powers, but Russian and Protestant states refused, and treated him as Bishop of Rome only. (b) Emperor of Germany formerly as successor of Charlemagne and the Caesars, was entitled to precedence over all other temporal princes; 1 Halleck, Int. L., 4 ed. (1908) 128.

⁵ The republics—United Netherlands, Venice and Switzerland, had lower rank. With the appearance of powerful

republics, as the Commonwealth in England, France and the United States, royal exclusiveness gave way and republics were accorded royal honors. They broke the snobbery of kings. By custom there appears to be a division into two classes: (a) State with royal honors—these are empires, kingdoms, grand duchies, and great republics. (b) States without royal honors—including all other states. (c) Congress of Vienna in 1815 attempted to establish order of precedence; attempt failed. States with royal honors are: Emperors, Kings, Grand Dukes, Elector of Hesse, Swiss Republic, United States of America, German Confederation, Great Republics, Holy See. See 1 Halleck, Int. L., 4 ed. (1908) 128 et seq.; Lawrence, Int. Law, 5 ed. (1913) 288–292; Martens, G., Law of Nations, (1788) Cobbett's Trans. IV. II.; 1 Oppenheim, Int. L., 2 ed. (1912) 171–173; 2 Phillimore, Int. L., 3 ed. (1879–1888) 59–65; Wheaton, Elements, Dana's ed. (1866) 232 et seq.; Zouche, L. of Nations (1650), Carnegie ed., Part I. IV., Part II. IV.

⁶ See §54 et seq., ante.

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power, as the power may exist without being exercised. It is, however, impossible to exercise power which does not exist. The word "jurisdiction" is used in several senses, but we shall use it as meaning the exercise of state power.⁷ Some writers define it as a right to exercise state power, which involves a tautology, as the word "right" can only mean power in this connection.⁸

This jurisdiction, or the exercise of the power of the state, will prevail until overcome by a superior force. Consequently, the test of what is or is not subject to the jurisdiction of a state is the fact of the exercise of the power, and nothing else. No person can possibly be affected by the actual exercise of the power of the state merely upon any theory. All such power of the state is personal in the sense that it is exercised only upon persons. The power of the state can never affect anything but human conduct. The state cannot fell a tree as the hurricane can or stop the rising of the tide, although the attempt appears to have been made. There is considerable difficulty as to personal and territorial jurisdiction and whether there is a conflict between them, to which topics our attention will now be directed.⁹

⁷ Jurisdiction is used to mean (a) exercise of power, (b) the power itself, (c) the subject matter of the power, (d) the place over which it is exercised. When, therefore, we speak of a person as being in the jurisdiction of the state, we mean that he is within the grasp or power of that state.

⁸ "Jurisdiction is the right to exercise state authority, and for the purposes of international law may be classified as (a) territorial or land jurisdiction, (b) fluvial and maritime, and (c) jurisdiction over persons;" Wilson & Tucker, *Int. L.*, (1901) 96. "Jurisdiction is the right to exercise state authority;" Wilson, *Int. L.*, (1910) 91. "The sovereignty united to the domain establishes the jurisdiction of the nation in her territories or the country that belongs to her;" Vattel, (1758) Chitty's *Trans.* Book II. §84. This jurisdiction of a state is obviously in

fact divisible, although it has been supposed by some writers, from a theoretical point of view, that it is not. The jurisdiction of the state being exercisable in different branches and over different subjects, it is clear that when some branches are confined to one organization and some to another, or some subjects to one and some to the other, that there is in fact a division of the jurisdiction. No such division, of course, can be practically perfect, and there will always be conflicts. The existence of such conflict, however, does not impugn the fact that the jurisdiction has been divided.

⁹ The following table shows the headings of the discussion:

| | |
|--|-----|
| Preliminary and definition..... | §96 |
| Personal..... | §97 |
| Territorial..... | §98 |
| Conflict between territorial and personal..... | §99 |

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Jurisdiction

PERSONAL JURISDICTION.

§97. We have not been able to find any definition of personal jurisdiction, and it is difficult to ascertain just what is meant by the phrase. It seems to have been supposed that tribal jurisdiction was personal, and that such jurisdiction differed in some way from the jurisdiction exercised by a modern state. The supposition as to the nature of tribal jurisdiction is correct as all state jurisdiction is personal but the obscurity lies in the difference between that and modern territorial jurisdiction. The tie which bound the member of the tribe was personal, and the error seems to lie in the assumption that that was the sole test of the jurisdiction of the state. An individual is subject to the jurisdiction of a state when he is in fact affected by the exercise of the state power, whether he is willing or not, and whether he is or is not in fact a member of that state. Membership in the state confers certain advantages and privileges but cannot be the test of whether the power of the state can be exercised as to the individual in question. A member of the state beyond the reach of the state cannot whilst absent be affected by the power of that government, and an individual within reach may be affected even though not a member. All state jurisdiction, therefore, is, and always has been, personal, and is exercised on the person in fact. What, therefore, is territorial jurisdiction?

TERRITORIAL JURISDICTION.

§98. The transition of man from a nomad to a settled state was the beginning of territorial jurisdiction. As soon as the tribe became permanently settled in one place and continuously inhabited the same specific portion of the earth, the notion arose that all other persons and tribes should be excluded from that territory. Therefore, the jurisdiction of the tribe settled there was the only jurisdiction exercised which was in fact personal jurisdiction. This economic change in fact gave rise to the conception of fixed territorial jurisdiction, which is the condition of modern political communities. Territorial jurisdiction, therefore, is where the power of the state is continuously exercised over all persons within a definite portion of the earth's surface and not over persons outside of that area. It is clearly impossible in fact for two states to exercise power over the same individual, and consequently impossible for them to exercise any power over the same community of persons unless the power of one is exercised in subordination to the power of the other, and

when two political organisms have arisen in any community, they have fought for supremacy, and one or the other or some other power has always prevailed; and when two adjoining communities come into contact they must either divide the territory between them or else one overcome the other. Territorial jurisdiction, therefore, is exclusive of the jurisdiction of any other state within the territory. There is some obscurity as to the facts existing in the middle ages down to the establishment of feudalism. Some writers would have us believe that a state of tribal law prevailed in which each man acknowledged the law of his tribe, and that the streets of Genoa, Rome, Athens and Alexandria were thronged with a multitude of persons subject to different laws and having no common political superior in the place where they met. It is doubtful whether such a state of affairs ever could exist anywhere for any length of time. The fact probably is that the man of the middle ages thought of the community of which he was a member as a tribe existing as such a body entirely apart from any locality which it might occupy, because that was the fact of the day. Tribal jurisdiction was the word which accurately described the situation.

The modern man, with perhaps a few unimportant exceptions, thinks of the state of which he is a member as a fixed political community having and demanding a certain area of the surface of the earth for its habitat. It is probably as impossible for the modern man to think of the state except as a fixed political community as it would for the primitive and ancient man to think of it except as a wandering tribe. Each forms a mental picture of the facts familiar to his day and generation.

The territorial jurisdiction appears to have developed slowly, to have been at first feeble, gradually acquiring strength as civilization increased and the community became more firmly and permanently fixed in its home. It must not be supposed that the transition from a nomad state to a settled life was sudden or accomplished by all tribes in the world at the same time. On the contrary, the process has taken many thousands of years, and there are nomad tribes still in existence in the world today (1919). Some tribes become settled before others, and as the fact of so-called territorial jurisdiction grew, complications would rise between it and the personal jurisdiction. Ten thousand years before the pyramids were built, some wandering tribesmen from Central Asia came into an agricultural community in the fertile plains of Mesopotamia and raised a question which still

engages the attention of legal philosophers and upon which vast stores of learning have been spent.¹⁰

CONFLICT BETWEEN TERRITORIAL AND PERSONAL JURISDICTION.

§99. The writers have generally retained the idea that the jurisdiction of the state over individuals depends on membership, and they have supposed, therefore, that there is in modern times a conflict between the territorial and personal jurisdiction when a member of one state goes into the jurisdiction of another. It is clear, however, that such a member leaves the jurisdiction of his own state behind, where it is exercised in fact, when he passes the frontier, because he cannot in fact thereafter be affected by that jurisdiction. He then in fact enters the jurisdiction of another state and cannot possibly be in any way subject to the jurisdiction of his own state except by some process by which that jurisdiction extends into the state into which he has gone. It clearly follows from the conclusions we have reached that such a state of affairs is impossible. There are two theories prevailing in modern times: one, the theory of personal jurisdiction, which represents the notion we have above adverted to, that the member when he comes forth from the state carries with him a certain jurisdiction of that state. The other, the territorial jurisdiction, which we believe rightly apprehends the actual facts as they exist in the world today, and which is that the jurisdiction exercised by a state within its territory is exclusive of the jurisdiction of any other state.¹¹ We shall have occasion to refer to this subject again at several points in the discussion.¹²

¹⁰ The jurisdiction of a state is always personal and exercised exclusively in a certain definite territory: On the surface, in the air, subterranean—territorial jurisdiction. Over a ship in the open sea—maritime jurisdiction. In the maritime belt—marginal jurisdiction.

¹¹ The following writers are of the opinion that the jurisdiction of the state extends over its members in the territorial jurisdiction of another state: Hall, *Int. Law*, 6 ed. (1909) 49–116; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 179, 393; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 258; Wilson & Tucker, *Int. L.*, (1901) 130. As pointed out by Phillimore, *Int. L.*, 3 ed. (1879–1888) Vol. 1,

444, great difficulty arises in the enforcement of the right of a state to recall its members abroad as no foreign state is bound to assist and the other state in question cannot invade the jurisdiction for the purpose of seizing one of its own citizens. The following seem to lean more strongly to the exclusiveness and strength of the territorial jurisdiction; Hershey, *Int. L.*, (1912) 172; Lawrence, *Int. Law*, 5 ed. (1913) 212–267.

¹² See §221, post, on extra-territorial jurisdiction. See §437, post, on aliens in the state. See §312, et seq., on maritime jurisdiction. See §170, post, on envoys. See §284, post, on jurisdiction over ships on the high seas.

SUMMARY.

§100. The purpose of this chapter is to describe the facts of international life, that is, the bodies of men whose conduct we are concerned with, which are independent states.¹

A nation is an aggregation of people having a common origin and language and greater or less community of law and custom.² A state, on the other hand, is a community of men exerting its power as an organization by its own inherent force and not by delegation of power from any other organization,³ the members of which do not necessarily have a common origin or language or a community of law and custom, and the sole bond of union between whom may arise merely from the fact of their dwelling together on the same territory. This state is a living organism and may be of any size, have any form of government, good, bad, or indifferent, may occupy a definite territory or not and still retain the essential elements of a state.⁴ A state, therefore, is to be distinguished from a nation in that the nationality of the people is not always coterminus with the people of the state, and a nation does not always have a separate political entity of its own. The exclusiveness and strength of blood and national relationship have been weakened by modern civilization with its freedom of individual movement from one state to another. The word "nation" is used by many writers and statesmen to describe the bodies which are more accurately designated by the word "state."⁵ States are to be classified as follows: (A) fixed, those continually occupying a definite territory. This is the type of the modern state.⁶ (B) Moving, those having no fixed habitat but roving over the surface of the earth. This type is almost extinguished and incompatible with modern civilization.⁷ (C) Independent, those having no superior political power. The word "sovereignty" often used in this connection is too ambiguous for accurate thought and has been discarded.⁸ (D) Belligerent and insurgent states which are communities exerting sufficient force to appear upon the international horizon, but not yet permanently fixed in international life.⁹ (E) Dependent states, which are those shut off from international life by being dependent on an independent state.¹⁰ The relation between an independent state and the state dependent upon it assumes a great variety of forms which the writers have frequently attempted to classify but the attempt has been utterly barren of any practical

¹ See §40, ante. ² See §41, ante. ³ See §48, ante. ⁴ See §49, ante.
⁵ See §42, ante. ⁶ See §43, ante. ⁷ See §50, 51, ante.
⁸ See §44, ante. ⁹ See §46, ante. ¹⁰ See §47,

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distinctions. The only feature of importance to the international lawyer is whether the dependent state is shut off from participation in international life in whole or in part. Some dependent states are entirely excluded from international life, as the member states of the United States of America, and others have greater or less international function, as the member states of Germany and Switzerland. The question in each case is determined by the municipal law and is a question of fact for the international lawyer. Independent and dependent states, with respect to the relation between them, may be classified as follows: (a) those where the union is of such a nature that each state governs the same territory—one superior and the other inferior. (b) Where the superior state exercises no function of government within the dependent state but controls it entirely through external contact with the dependent state organization. (c) Where the dependent state is completely merged in the independent state so as to entirely lose its identity as a state.¹¹ (F) Neutralized, which are states which have been deprived by agreement with other states to a greater or less extent of the function of making war. They have been, as it were, devitalized with respect to one of the international functions. Such states are entirely modern having been set up in western Europe in the twentieth century for political reasons.¹²

The government of the state is the political organization which exercises the collective power of the people of the state, and is the organ by which the state participates in state life in general and international life in particular.¹³ The word "state" is sometimes used to refer to the government, and since the international law determines the conduct of those governments, the word "government" could be substituted for state with a gain in accuracy. The word "state," however, is sufficiently clear and will be retained in deference to the established usage, which is not to be departed from except under necessity. The state, therefore, may survive the government, may indeed have a number of successive or even simultaneous governments, but the government cannot survive the state.¹⁴ The government assumes a variety of forms which are regulated solely by municipal law and are of little concern to the international lawyer who only needs to find some kind of a government to deal with in an international aspect.¹⁵ Two or more different governments cannot exist in the same state at the same time without one being subordinate

¹¹ See §52, ante.¹² See §53, ante.¹³ See §56, ante.¹⁴ See §54, ante.¹⁵ See §55, ante.

to the other.¹ The government of an independent state may assume any title it sees fit, which, however, will not have any currency in international life until recognized by the other independent states of the world.² The phrase—a *de facto* government—seems to be properly applicable to a government existing in fact, and therefore all governments so existing are *de facto* governments. It is, however, used to describe the government which does exist in distinction with the government which ought to exist according to municipal law. Such a government is for the time being the organ of the state and will have greater or less international functions according to how fully it is developed as an organ of the state it stands for.³

States have been personified, i. e., described as persons, and independent states are frequently referred to as international persons. This phrase is very convenient and sufficiently clear. Monarchies are generally referred to in the feminine, and republics in the neuter gender.⁴ States are living organisms and will come into existence and terminate from time to time from various causes. The extinction in fact of a state is a very rare occurrence and most states come into existence by breaking off from other states,⁵ just as some forms of animal life reproduce themselves by some division of the parent body. There is, however, a distinction to be drawn between the international appearance and reappearance of a state and its extinction or birth as a fact. It follows from the previous distinction of dependent and independent states that some states will appear in international life and others will be shut off. Independent states may from time to time disappear from international life, and a state dependent or shut off may break the political power which is above it and burst into international view. The only question for the international legal philosopher is as to when a state appears and reappears on the international horizon.⁶ A state disappears from international life by merger in another state, which may be by conquest or voluntary union,⁷ and it appears in international life by separation from an existing state which may either be forcible, or by voluntary agreement with the other state.⁸ A new state may also appear by a body of men setting up in territory not formerly occupied by any other state.⁹ Another case is where a number of states combine to form a new state, as the thirteen American colonies formed the United States of America. In the latter case a number of states sometimes disappear from international life behind the

¹ See §59, ante. ² See §58, ante. ³ See, ante. ⁴ See §62, ante. ⁵ See §64, ante. ⁶ See §57, ante. ⁷ See §60, ante. ⁸ See §61. ⁹ See §63, ante.

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new state which is set up.⁸ The cases, therefore, of the international appearance and reappearance of states may be reduced to a very few headings. Most writers fail to distinguish the separability of the international life of a state from its life as a state in fact.⁹

The international appearance or disappearance of a state will have an effect upon the international relations it has or assumes with other states¹⁰ and also has an effect upon the members of the state who by the appearance lost their membership in the old state of which they were a part, and became members of a new international body, and in the case of a disappearance, lost their membership in an existing international body and became the members of some other body.¹¹

The notion of the continuity of a state simply expresses the fact that a state is a live organism of such vitality that it will survive nearly all the events of municipal and international life.¹²

A notion has been advanced in this connection borrowed from the Roman law, that there is a succession of states. The theory of succession in the Roman law appears to have been evolved to explain the devolution of property rights which occurred upon the death of the owner. The theory, however, seems inapplicable in international law because a state can never be said to die leaving property in the way an individual does.¹³ We must distinguish two cases in this connection—(A) succession of states¹⁴ and (B) succession of government in the same state.¹⁵ In the case where one state disappears and another takes its place, the international effect of the change will usually be adjusted by agreement between the states concerned. The question of government merely involves a change in the organ of the state for international activity, and such change will ordinarily have no effect on the international status of the state itself.

The conduct of a state necessarily consists of an act or series of acts known as state acts. These acts are performed by the officials of the state acting under and by authority of the state government.¹⁶ An individual may perform an act which the government may subsequently ratify and adopt, and, if it does so, it only does so by considering in effect that the act of the individual, when he did the act, was an act of the government. It helps the apprehension of this part of the subject to remember that the government acts for the people, and that the only act which is a state act is a government act. The act of the government is binding upon the people in all parts of the state, and the political action of the head of the state

⁸ See §62, ante.¹⁰ See §66, ante.¹² See §69, ante.¹⁴ See §71, ante.¹¹ See §67, ante.¹³ See §68, ante.¹⁵ See §70, ante.¹⁶ See §72, ante.

or the organ of government, whatever it may be, which is the chief organ in the state, binds all other departments of the state, and they are bound to assume that international facts exist as they are recognized to exist by such chief organ.¹ There are certain limitations upon a state act which do not exist in municipal life. A state may not act outside its jurisdiction except in the open sea or in territory of no state without infringing the jurisdiction of another state. Each state, is, therefore, as it were, shut up within the limits of its own jurisdiction and this confinement of state activity necessarily affects the relations between them presenting opportunities for greater friction than would occur if there were greater freedom of state action.²

Every state act will have—(A) an international effect;³ (B) a municipal effect,⁴ and the distinction between the two must be clearly kept in mind.

The independent states of the world form a community of independent states whose association arises primarily from the circumstance that they exist together on the surface of the same planet.⁵ There is no tie of blood, relationship or political organization between these states. They are united by a common self-interest in the international life of which they are a part. Commerce, interchange of ideas, civilization of the members of these states, create an international life which compels the governments of the states to co-operate, in order that their own members may not be shut off from the benefits thereof.⁶

The family of nations was a term applied to a smaller body of these independent states originally composed only of the civilized powers of western Europe. Its circle was assumed to comprise the only independent states participating in international life and having international relations. This was true in the 16th and 17th centuries. Now, however, the growth of commerce and communication has been so extensive that all parts of the world are brought together in a common bond, and there are very few independent states of the world which are not sufficiently civilized to be members of this community of states. One may, therefore, say that the community of states today practically comprises all the independent states of the world. Membership in the community is simply the fact that a state is of such civilization that it will respond equally with the other states to the pressure of the external factors deter-

¹ See §73, ante.

² See §74, ante.

³ See §77, ante.

⁴ See §79, ante.

⁵ See §75, ante.

⁶ See §76, ante.

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mining independent state conduct. There is, however, no political organization of this community of states, although many attempts have been made to create one.⁷

Recognition is an outward and visible manifestation of the mental comprehension of an existing fact or state of affairs and is properly used as applicable to people and things. Recognition is of importance in international life because of the somewhat, as it were, artificial and conventional aspect of the relations between independent states.⁸ The facts of international life, appearance and disappearance of states, changes of government and changes of title necessarily produce a change in the mechanism of the international intercourse in which those states are participating. When such a change occurs, it must be recognized as such by the other independent states. We have, therefore, recognition of new states, of new governments, of heads, of state, of titles, and recognition of the disappearance of a state.⁹ The chief question is as to the recognition of a new state.¹⁰ This is a question of fact. Has the state achieved its political independence and is it free from all external political control?¹¹ If it is, it is in a position to participate in international life with other independent states. This fact must be determined by independent states and is a fact which is generally forced upon them by the rising political power of the new independent state.

In so far as these states are all independent and free from external political control, they are equal. This is true in theory. There can be no theoretical inequality between two bodies, both of which are absolutely free from external control.¹² There is, however, an inequality in fact, a difference in power and strength between these independent states of the world from which it follows that some states will exercise greater influence and power than others, and some of the states, such as Switzerland, Holland and Belgium, are very weak in comparison to the resources of the great powers.¹³ The writers insist upon, and correctly, the theory of the legal equality of states, by which is to be understood that the jural conception of the conduct of independent states as influenced by external factors is the same with respect to the conduct of every independent state. They are all subject to the same external factors and none of them have any factors determining their conduct which do not apply to the others, but which factors do not operate equally on all the states.

⁷ See §80, ante.

⁸ See §82, ante.

¹¹ See §84, ante.

¹³ See §91, ante.

⁹ See §83, ante.

¹⁰ See §85, ante.

¹² See §92, ante.

This inequality in fact or political inequality necessarily causes conflicts between the independent states for supremacy one over the other. Since the fall of the Roman Empire there has been no world power, and the independent states of the world have been maintained in a state of equilibrium; that is to say, no one of them has been able to gain an ascendancy over all the others. The maintenance of this equilibrium is referred to as the balance of power, and the maintenance of that balance of power has been a cardinal principle with statesmen in western Europe since the close of the Thirty Years War. It is probably essential to the future development of international law that this balance of power be preserved because it is only by the continuance and existence of a community of independent states that there can ever be achieved a political tie between those states which will be sufficiently strong to control them, maintain peace, and, at the same time, have the element of permanency in its organization. If any one power becomes a world power before that political organization is achieved, we will revert to the state of affairs which existed in the days of the Roman Empire, and when that world power has been broken up there will be another long period of disintegration and re-alignment following similar to that which occurred after the fall of Rome.¹⁴

The Monroe Doctrine may very properly be considered a contribution by the United States of America to the maintenance of the balance of power. At the time it was promulgated it did not seem to have that effect. The increase in solidarity of the world and growth of wealth and commerce of the South American republics are gradually shifting the center of international life from western Europe to a point which will reflect an enlargement of the community of independent states to the entire world in which the equilibrium must be maintained among a larger number of communities.¹⁵

The word "jurisdiction" has several meanings, but is used in this treatise to mean the exercise of the power of the state. The power may exist without being exercised, but it is not possible to exercise power which does not exist.¹⁶ The power is exercised through the political organization or government and can only affect human conduct, and therefore is personal; that is, it can be exercised only on and over persons. The jurisdiction of a state will prevail until overcome by a superior jurisdiction, and every one is subject to that jurisdiction who may, in fact, be affected by it, that is, is within its

¹⁴ See §93, ante. ¹⁵ See §96, ante.

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grasp. Jurisdiction is a fact and subjection to that jurisdiction is a fact.¹ A distinction has been drawn between territorial and personal jurisdiction and a very curious idea extensively entertained as to the so-called extension of the personal jurisdiction of one state into the jurisdiction of another.² All jurisdiction when man lived in a nomad state, was roving, and the tribes of the simple life of the time, no doubt lived in close proximity without any of them losing their jurisdiction and status as independent states. When a tribe became settled, its jurisdiction was exercised continually over a definite fixed portion of the earth's surface and necessarily excluded the fact of any other jurisdiction being exercised within that same area. No individual can be subject in fact to two different jurisdictions, and no two or more individual members living in the same community can be subject to two different governments.³ This territorial jurisdiction is none the less personal, but the phrase "territorial" which was adopted, raised the unfortunate notion that the jurisdiction was somewhat different, which partly conduced to the formation of the strange conception of the extension of the personal jurisdiction of one state into another. It was, and is still, supposed by many writers that when a member of a state ventured into the jurisdiction of another state, he was still subject in a measure and to a certain extent to the jurisdiction of his own state, and that the position of a foreigner in the jurisdiction is regulated by an adjustment of the necessarily resulting conflict between the territorial jurisdiction and the supposed personal jurisdiction of the foreign state which he brought in with him. The supposition is impossible, as the jurisdiction of one state cannot be exercised in the territorial limits of another, for as we have seen above, there cannot be two governments in the same jurisdiction. A foreigner in the jurisdiction is in fact subject to its grasp, irrespective of alienage and the jurisdiction over members depends on the fact of power and not on the membership, whatever importance the latter fact may have in other connections.

It has been supposed that since the jurisdiction of a state depends on membership that the foreigner in the state is in a different position with respect to that jurisdiction. The facts of the case, however, force the adherents of this rule to refrain from pushing it to its logical conclusion. It is believed that the fact is obvious that the jurisdiction within the limits of a state is complete and conclusive,

¹ See §96, ante. ² See §99, ante. ³ See §98, ante.

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and exercised as to all persons therein, irrespective of how they came there, or what their ties are with any other state, and that any position which any foreigner may have in the jurisdiction arises because of some external international factors of conduct operating on this power of the state and compelling it to exercise that power in a certain way with respect to the foreigner. The only question, therefore, from an international point of view, is how far these international factors of conduct restrain the exercise of the jurisdiction of a state in any respect at all.⁴

⁴ See §99 ante.

CHAPTER 3.

DEFINITION AND NATURE OF INTERNATIONAL LAW.

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PRELIMINARY.

§103. This chapter will be devoted to a discussion of the nature and definition of international law, and will be an application to state conduct of the reasoning already applied to individual conduct. It has already been pointed out that law,¹ when classified with respect to the external factors determining conduct, may be divided into the jural conception of the conduct of bodies which are not subject to the restraints of external political power, and the jural conception of the conduct of bodies which are so subject. Independent states have also been distinguished and described as the only bodies in the

¹ See §27, ante.

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world whose conduct is not subject to external political power.² International law, therefore, is that branch of law which relates to the conduct of independent states. In the previous chapter,³ we have pointed out that independent states are living organisms having certain inherent powers and unrestrained by any exterior political power. The unrestrained exercise of this power would result in anarchy. Each state is in fact restrained by certain factors, and the exercise of restrained power by a state results in an appreciable amount of international order. Our task now is to discover what those restraints are and how they may be described and their operation known. It is important for the student of international law to clearly keep in mind that we start with unrestrained power of organisms as a fact, and study the restraints which exist on the exercise of those powers.

THE INTERESTS OF AN INDEPENDENT STATE.

§104. A state has an interest⁴ in an object, just as an individual has, when any change in that object will affect the state. Since, however, the activity of a state is confined almost entirely within its own limits by the facts of international life,⁵ it follows that the interests of a state will be few in number. Those which may exist are enumerated in tabular form in the note.⁶ An individual interest will be subordinate to the collective interest of the state. Thus, an individual has an interest in his own life; the state has an interest in its preservation, and it is better that the state should be preserved and one or more individuals perish than that a few individuals should survive and the state should perish. The extent to which state or individual interests prevail varies in different communities and in the same community at different times, depending on various factors which are immaterial to the present discussion. The interest of a state is unprotected by external political power but is protected by the factors determining independent state conduct which will next be discussed.

² See §48, ante.

³ Chap. 2.

⁴ See §4, ante, on definition of an interest.

⁵ See §74, ante, on limitations on state act.

⁶ A state will have the following interests:

- (1) An interest in itself, its territory, form of government, municipal law.
- (2) An interest in its officials, when they venture forth from its jurisdiction, which will be—
 - (a) On the open sea,

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Factors Determining Conduct

FACTORS DETERMINING THE CONDUCT OF INDEPENDENT STATES.

§105. The factors determining the conduct of an independent state are easily described, and a brief reference to them will be sufficient. There is no political authority external to an independent state,⁷ consequently no power which can afford redress for damage to a state interest, determine a dispute between two states, or coerce an independent state to perform any particular act.⁸ States do, however, observe habitual and uniform conduct in many particulars, to which they are influenced by certain factors, to understand which we must bear in mind that although states are in fact organisms, they are operated by men.⁹ No state can act without some one or more human wills determining that act. The behavior of the state will therefore be subject to the same principles as govern the conduct of men, because no man, upon assuming a state office, can divest himself of human attributes and become an impersonal machine. An independent state will be governed in its conduct by—(A) Self-interest, (B) Inherent prejudice, (C) International public opinion, (D) Custom or precedent, (E) Pressure from one or more other states, apart from political power. A state act¹⁰ will be influenced in any given case by these factors in varying degrees, and they may or may not act together. Self-interest will in some cases control and the others will be defied. The force of habit and custom is so great in human affairs that a state will endeavor to show that what is demanded by self-interest is in accordance with precedent and international public opinion. These factors will be referred to for convenience as international factors determining the conduct of independent states.¹¹ They are of varying force and the views of

- (b) Within jurisdiction of another state,
- (c) In jurisdiction of no state.
- (3) An interest in its members beyond its borders,
 - (a) On the open sea,
 - (b) Within the jurisdiction of another state,
 - (c) In jurisdiction of no state.
- (4) An interest in another state.
 - (a) Another independent state,
 - (b) A dependent state.
- (5) An interest in the open sea and in territory not subject to the jurisdiction of any other state.
- (6) An interest in the maritime belt.

⁷ See §48, ante, on independent states.

⁸ See §81, ante, on no political organization of the community of states.

⁹ See §18, ante, for the distinction between a state and its government. For the purposes of this chapter the distinction is immaterial and the word "state" will be understood to include the government unless otherwise indicated by the context.

¹⁰ As to definition of state act see §72, ante.

¹¹ Some of the writers indicate an apprehension of the external factors; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 13, et seq.

most of the writers on international law are colored by the emphasis placed on a particular factor to the exclusion of the others.

The principles of ethics as influencing conduct are excluded from the discussion. These principles, so far as they may be determined and agreed upon, are solely the result of a more advanced culture and regard for the interest of others than is common to the average member of the community, and are therefore representative only in a small part of public opinion. The operation of these principles is too weak, therefore, to justify the inclusion of them in the factors which actually operate with effect in international life.¹² The influence of ethics is naturally very strong in theory as the writers represent the best element in the community, and accordingly we find most of them over-emphasizing the ethical aspect of the subject and coloring their statements of international law with this view so strongly that they generally leave an entirely erroneous impression. There is no universal standard of justice,¹³ consequently the opinion of what is just in any particular case will only be the opinion of the writer, and it is clear from a cursory examination of the facts of the international life that the conduct of independent states falls far short of the general standard of justice entertained by even the middle classes of the individuals in the world. Justice will therefore figure in our discussion only as an ideal to be striven for but rarely attained,¹⁴ and totally irrelevant in an inquiry into the jural conception of independent state conduct.

INDEPENDENT STATE CONDUCT AS DETERMINED BY INTERNATIONAL FACTORS.

§106. The conduct of independent states as determined by these factors forms a body of facts which may be reduced to some semblance

¹² See Lawrence, *Int. Law*, 5 ed. (1913) 13, et seq., for a good discussion of the place of ethics in law and the distinction between them. This distinction also apprehended by Hall, *Int. Law*, 6 ed. (1909) 2; Woolsey, *Int. L.*, 6 ed. (1897) 3.

¹³ Hall, *Int. Law*, 6 ed. (1909) 2; See §28, ante, on justice. Woolsey, *Int. L.*, 6 ed. (1897) 1, however seems to think that there is a universal standard of justice.

¹⁴ Thus Lawrence, *Int. Law*, 5 ed.

(1913) 10-12, says that international law may be regarded as an a priori investigation into what the rules of international intercourse ought to be or historical investigation of what they are. "Two principal views may be held as to the nature and origin of these rules (of international law). They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of

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Redress for Damage to a State Interest

of order by analysis, just as in the case of the conduct of individuals. The description of that orderly conduct is referred to as a rule. It is true that the states on particular occasions do endeavor to determine what the rule is, that is, find a description of the conduct to be followed, and determine their action accordingly. Among states we find a very large amount of self-conscious action in which the state is voluntarily and consciously endeavoring to adjust its conduct to some description which may be obtained of conduct in the past or to the play of the international factors of conduct as they operate at that particular time.¹⁵ There is in international affairs also an unconscious adjustment of the conduct of each independent state to the interests of other states and the welfare of the community of states as a whole, which adjustment is maintained until the incentive to damage the interest of another state becomes so great that the international factors of conduct are disregarded and an act of damage results. The various states follow certain habitual conduct from motives of necessity and self-interest; that is, voluntarily, without any special pressure from another state.¹⁶ This conduct exists apart from any description. We have the same difficulty in international relations in separating the rule and the factors. We can see more clearly, since we are dealing with larger bodies, how conduct to a large extent is orderly, and how the tendency is to voluntarily adhere to a habitual course of conduct unless there is some powerful motive to the contrary.

REDRESS FOR DAMAGE TO A STATE INTEREST.

§107. An independent state may have an interest, but it cannot have any potentiality of redress secured by external political power for the simple reason that there is no such power in existence. A state, therefore, whose interest has been damaged by the conduct of another state, will be able to obtain redress when denied only by setting in motion the external factors influencing the conduct of

the moral development and the external life of the particular nations which are governed by them;" Hall, *Int. Law*, 6 ed. (1909) 1.

¹⁵E. g.—Germany's attempt to justify her violation of the neutrality of Belgium in 1914.

¹⁶ The general observance of the rules

of international law by the independent states of the world remarked on by Manning, *Int. L.*, 2 ed. Amos. (1875) 89, 90, where he refers to the conscious cultivation of the law and appeal to its standards. See Lawrence, *Int. Law*, 5 ed. (1913) 3; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 14.

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independent states to which we have already referred.¹ These factors may also be set in motion by a state which has not been damaged, for selfish purposes. There will often be a difference of opinion, as to which there is no power competent to decide, whether in any case there has been a damage to a state interest, or whether the state is proceeding for the purpose of obtaining redress or merely for selfish ends.² The interest of a state may be damaged by the force of nature, by the act of another state, or by the act of an individual. The independent state thus damaged will seek redress through any one or more of the external factors influencing state conduct as follows: Where the damage is caused by act of an independent state against the independent state itself; where caused by act of a dependent state wholly excluded from international life against the independent state on which it is dependent; if partially existing in international life against such dependent state to the extent allowed by the independent state upon which it is dependent. If the damage is caused by a dependent state dependent on the independent state damaged, the redress is a matter of municipal law unless the dependent state exists to such an extent in international life as to bring its conduct wholly or partially within the influence of the factors already referred to affecting the conduct of independent states, in which case the redress is wholly or partially under these. If the damage is caused by an individual, a distinction is to be drawn between a member of the state and an alien. If by a member of the state damaged, the redress is a matter of municipal law. If by a member of another state, the redress is against the state of which he is a member in the same manner as in the case of a dependent state wholly shut off from international life. Where the damage is done to a member of the state while within the jurisdiction of another state, the individual will have the redress, if any, afforded by the municipal law of that state, and his own state will have a redress through international factors of conduct against the other state.³ In international life, therefore, the law is in a condition of self-help, or rather, we should say, international life is in a condition of self-help; that is, each state must act for itself and cannot rely on any superior political

¹ See §105, ante.

² The discussion in this chapter will, for the purpose of the theoretical examination of international law, be confined to conduct damaging a state interest. State acts in retaliation for

act of damage, and conduct without reference to any redress, will be subsequently discussed in Chapter 10.

³ See Chap. 8 on independent states and aliens.

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Definition of International Law

power, as the individual can in municipal life.⁴ Although the state must act for itself, the international factors of conduct in many cases constitute an external force assisting the state. It is therefore not strictly accurate to confine our attention to the act of the state and ignore the other elements, because in many cases the state acting by itself will be unable to secure redress.

INTERNATIONAL LAW: DEFINITION.

§108. It appears, therefore, that we have certain bodies and facts concerning those bodies, to-wit, their conduct, the external factors determining that conduct, which operate by way of restraint on the inherent power of the state organism, and further, that the conduct so determined may be described in terms of order. Our next task is to define international law, that is, to see how the word "law" is applicable to those facts we have referred to. It is necessary to examine the nature, scope, application and definition of international law, and then dispose of certain subordinate topics, some of which are to be distinguished and excluded from the discussion. In defining international law, therefore, we have to consider the distinction between the conduct and the factors determining that conduct, and further remember that we cannot exclude one or the other of them but must embrace them all in our definition. International law, therefore, is the conception in terms of order of the conduct of independent⁵ states as influenced by external and internal factors, from which external factors are excluded the forces of nature and external political power, which we may call the jural conception of the conduct. It is necessary to add internal factors which were excluded in the definition of law in general, because an individual state is frequently powerfully impelled by self-interest to observe a certain course of international conduct, and secondly, international public opinion will proceed in part from within each state, and it is difficult to separate that part of it which is external to a particular state, from that which is internal within that state. It is necessary also to distinguish the point of view. We have past conduct, present conduct and future conduct, and the principal discussion is as to future conduct.

The inquiry in any case will be: (A) What conduct have independent states in the past habitually followed? (B) What conduct

⁴ See Chap. 10 on redress for damage to a state interest.

⁵ That independent states are con-

cerned has been recognized by some writers, e. g.—Zouche, *L. of Nations* (1650), Carnegie ed., Part I. 1. 2.

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do they follow at the present time under one or several external factors, none of which include superior political authority? (C) What conduct may a state consequently be expected, in the absence of any compelling self-interest to act otherwise, to follow in the future, under the influence of these external factors determining conduct? Many definitions of international law have been proposed, and a number of them have been collected in the note.⁶ These definitions are generally too narrow, as they emphasize either the description of the conduct or one or the other of the international factors, and many of them incorporate the ambiguous word "right."

⁶ International law "is the result of an implied agreement among civilized nations to abide by those practices which have proved most conducive to the promotion of profitable intercourse in peace and to the mitigation of suffering and hardship in war;" Frederic R. Coudert, 36 *Amer. L. Reg. and Rev.* N. S. 362. "International law is the final expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows, the moral and intellectual convictions of mankind;" Prof. Cairns, quoted—Wheaton, *Elements*, Dana's ed. (1866) 23. The law of nations when we distinguish it from natural law or international law is the law enjoining the utility of the great aggregate system of communities; Grotius, Belli, ac. Pacis (1625), Whewell's *Trans. Proleg.* 17. "The rules of conduct regulating the intercourse of states;" 1 Halleck, *Int. L.*, 4th ed. (1908) 50. "International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of

infringement;" Hall, *Int. Law*, 6 ed. (1909) 1. "International Law or the Common and Conventional Law of Nations is that body of principles, rules and customs which are binding upon the members of the international Community of States in their relations with one another or with the nationals of other states;" Hershey, *Int. L.*, (1912) 1. "According to Heffter, one of the most recent and distinguished public jurists of Germany, 'the law of nations, *jus gentium*, in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law (*recht*) founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular state.'" Heffter, quoted by Wheaton, *Elements*, Dana's ed. (1866) 16. "International Law may be defined as the rules which determine the conduct of the general body of civilized states in their mutual dealings;" Lawrence, *Int. Law*, 5 ed. (1913) 1. "The law of nature realized in the relations of separate nations;" 1 Lorimer, *Inst.* (1883-4) 1. "The realization of the freedom of separate nations;" 1 Lori-

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mer, Inst. (1883-4) 2. "The law of nations is the realization of the freedom of separate nations by the reciprocal assertion and recognition of their real powers;" 1 Lorimer, Inst. (1883-4) 3. "It is in this limited sense, namely, as comprising the rules which control the conduct of independent states in their relations with each other, that the term 'Law of Nations' is employed in the following treatise;" Manning, Int. L., 2 ed. Amos. (1875) 3. "Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other;" 1 Oppenheim, Int. L., 2 ed. (1912) 3. "From the nature then of States, and from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws. These are the laws which form the bond of justice between nations . . . and which are the subject of international jurisprudence and the science of the international lawyer, *jus inter gentes*;" 1 Phillimore, Int. L., 3 ed. (1879-1888) 3, 4. Puffendorf says that "the rules of abstract propriety, resting merely on unauthorized speculation, and applied to international transactions, constitute international law and acquire no additional authority when by usage of nations they have been generally received and approved of;" 1 Wildman, Int. L., (1849) 28, quoted Woolsey, Int. L., 6 ed. (1897) 12, 13. "I claim then that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'International Law';" Lord Russell, Address at Saratoga Springs, 12 Law Quar. Rev., 313. "The proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independ-

ence, and a test of their independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities, and to regulate the mode of discharging their obligations without the consent of any Political Superior, the rules which result from mutual relations and which govern their intercourse, resolve themselves into Natural rules and Positive rules and the aggregate body of those rules which admit of being enforced, constituting the Law of Nations in the most extensive sense of the term;" Twiss, L. of Nations, Peace, 2 ed. (1884) 145. "The Law of Nations is the science which teaches the rights subsisting between nations or states and the obligations correspondent to those rights;" Vattel, (1758) Chitty's Trans. Prelim. §3. "International Law, otherwise called the Law of Nations, is the law of the society of states or nations;" 1 Westlake, Int. L., 2 ed. (1910) 1. "International law, in a wide and abstract sense, would embrace those rules of intercourse between nations, which are deduced from their rights and moral claims; or in other words, it is the expression of the jural and moral relations of states to one another;" Woolsey, Int. L., 6 ed. (1897) 2. "In a more limited sense, international law would be the system of positive rules, by which the nations of the world regulate their intercourse with one another. But in the strictness of truth this definition is too broad, for there is no such law recognized as yet through all nations;" Woolsey, Int. L., 6 ed. (1897) 3. "Coming within narrower limits, we define international law to be the aggregate of the rules which Christian states acknowledge, as obligatory in their relations to each other, and to each other's subjects;" Woolsey, Int. L., 6 ed. (1897) 3. "International law, as understood among civilized nations, may be defined as

Operation of International Factors of Conduct

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International law is a pure conception, a conception from which the external factor of superior political power is excluded, and is therefore difficult for the English-speaking lawyer to grasp because he is accustomed to thinking of law as having that external factor present. Grasp that distinction he must if he wants to understand international law. International law can have no motive, no purpose, no subject, no object. The conduct followed by a state may have such a character and also the factors influencing that conduct, but it is difficult to see how the conception of the conduct as so determined can have any such characteristics. It is true that in practice we say the law compels this. The statement is ambiguous. What we mean is, that the state, acting through its appropriate organs, will attempt to furnish redress as to conduct of a certain description.

The Operation of the International Factors of Conduct.

PRELIMINARY.

§109. Much confusion exists because of the failure to distinguish the factors and the conduct from the conception of international law, and a number of different notions have from time to time been

consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent;" Wheaton, *Elements*, Dana's ed. (1866) 23. "Public international law is the body of generally accepted principles governing relations among states;" Wilson, *Int. L.*, (1910) 3. See n. 3 for collection of definitions. "International law is the customary law, which determines the rights and regulates the intercourse of independent states in peace and in war;" 1 Wildman, *Int. L.*, (1849) 1. "International Laws are rules of conduct observed by men towards each other as members of different States, though members of the same International Circle;" Walker, *Science, Int. L.*, (1893) 44. "International law consists in those rules of

conduct which civilized States observe in their relations with one another and with one another's subjects;" Walker, *Man. Int. L.* (1895) 1. "International Law is the code of states and of communities to which has been accorded recognition of belligerency;" Walker, *Man. Int. L.*, (1895) 3. "Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another, and which is observed by nations at peace and by those at war;" Zouche, *L. of Nations* (1650), Carnegie ed. Part I. I. "The various ideas of law formed in different societies and times, and the various groups of customs which have been obeyed as law, have probably not

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Legal Nature of International Law

put forward some of which, when critically examined, are seen to be mere offsprings of that confusion and accordingly are to be banished from the realm of accurate thought. Other notions correctly express one or more aspects of the operation of the international factors of conduct and to that extent are to be retained. There are several headings under which this part of the discussion usually appears, and it will perhaps simplify our attack upon the problem if we take it up under them. The writers usually discuss the legal nature of international law, the sanction of international law, the scope and application of international law, and the subjects and objects of international law.

THE LEGAL NATURE OF INTERNATIONAL LAW.

§110. Thus, many writers undertake to prove that international law is of a legal nature. If the propositions we have laid down are correct, there is no occasion for the discussion because international law is by the definition a conception in terms of order of the conduct of certain bodies, and therefore as much of a legal nature as the like conception of the conduct of individuals. The views of the writers, however, are not disposed of so easily. The discussion of the question whether rules of international law are legally binding plainly begs the question because it involves the meaning of law, and further, fails to distinguish that there is no factor of political power in international relations, and that therefore international law is different from municipal law. If, however, law is used, as it often is, to mean the external factor of superior political power, then international law is not law because there is no superior political power. The controversy, therefore, is hopelessly obscured in the ambiguity of the word "law" and reaches no rational conclusion. When it is carefully analyzed we will find it is nothing but a meaningless controversy over words. The views of some of the writers are collected in the note.⁷

yet been sufficiently compared and analyzed, and until an adequate comparison and analysis have been made, no definition or description of law can be regarded as final;" Hall, *Int. Law*, 6 ed. (1909) 14. As to definitions see Wheaton, *Elements*, Dana's ed. (1866) 23.

⁷ Hall, *Int. Law*, 6 ed. (1909) 13-16,

says international law constitutes a branch of true law because cast in a legal mould and treated in practice as being legal in character, although lacking the sanction of determinate political authority, and lying, as he admits, on the extreme frontier of law. Hall, *Int. Law*, 6 ed. (1909) 18, says absolute independence of states is unnecessary to

the conception of a legal relation between communities independent of each other; that international law could exist just as well in a world of equal states dependent on a common superior, which is true, because then there would be a common political superior exercising to a greater or less extent the power of the state. It is not, however, a question of conception but a question of fact. We are studying bodies which have no external superior in fact, and that is all there is to it. The facts might have been otherwise, they may be otherwise in the future, in either of which events we will be studying different facts. Hershey, *Int. L.*, (1912) 5-9, describes international law as a branch of true law and discusses the external factors determining state conduct. The proposition he states demonstrates the obscurity in the use of the word law. If true law is municipal law then law must have political power to enforce it and international law is not true law. He points out that some branches of municipal law are not enforced by political power of the state and that, in some cases, where the political power assumes to act, it fails because the people are not in accord. That is to say, the factors determining conduct in municipal life may not agree with the political power and its exercise will be futile. Lawrence, *Int. Law*, 5 ed. (1913) 2, says that the principles of international law are rules whether they are or are not laws but the question whether it (international law) confers rights depends on whether the term law is properly applied. The question as to the application of the term law depends on the definition of the term law. It is reasoning in a circle to argue that the distinction between international and municipal law is based on any meaning given the word law. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 8-15, after defining law as a body of rules for

human conduct within a community which by common consent of this community shall be enforced by external power, concludes that international law is law in the same sense because he finds in international life all the three elements of law, to-wit; a community, which is a community of nations; second, a body of rules for the conduct of the members of the community. These rules he finds in the rules of conduct which have grown up in the last few centuries and in the written rules created by international agreements. And a third element, in a common consent of the members of the community that these rules shall be enforced by external power, which external power he finds in self-help and intervention on the part of other states which sympathize with the state wronged. This external power, however, does not include superior political power of the state; therefore, the supposed analogy breaks down as to one of the elements. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 1, 76-78, answers the objection that there can be no law between independent states because no common political superior, as follows: (1) As a matter of fact, states do recognize the existence and independence of each other, out of which society law must necessarily spring, that the rule of right regulating intercourse between themselves is such law, which is no answer but simply an assertion that law exists in such a society, which is denied by the proposition. (2) The proposition confuses the physical sanction of law enforced by political superior and the moral sanction of right. (The learned judge would have more accurately said, the proposition takes only one view of the possible meaning of law and excludes the other, not so much a confusing of the two as an overlooking of one.) That irrespective of the international means of enforcing,

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Sanction of International Law

SANCTION OF INTERNATIONAL LAW.

§111. There can be no sanction of international law, as that word is applied to municipal law enforced by political authority. There are, however, the external factors of compulsion which may be described as a sanction.⁸ International life is in a condition of self-help, that is, each state must, if it cannot persuade another state to afford redress, take measures to compel that redress. The difficulty is that this freedom of action has and does result in many acts of oppression and is used for selfish purposes, which circumstances have led the writers, confused by ethical notions, to attempt to pass judgment on particular acts, and suppose that there is some power to determine what a state shall or shall not do, which supposition, however, is nothing but the opinion of the writer upon the state conduct in question.

the law must remain, as God has willed the society of states as He has that of individuals. (3) Most, if not all, civilized states have incorporated into their own municipal law a recognition of the principle of international law. While this clearly refers to the acknowledgment by individual states of the existence of international law, it sheds no light upon the proposition which is as to the quality or character of that law. (4) History demonstrates that a certain nemesis overtakes the transgressor of international justice, citing the first partition of Poland as opening an "Iliad of Woes." It may be true that a nemesis does overtake the wrongdoer, but an accurate reading of history will fortify the conclusion that the wicked get away with the goods in international life as often as they do in municipal life, and the instances in which they do in municipal life are certainly very frequent. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 175, 176, however, answers more accurately—that the absence of any superior political power is immaterial since the rules of international conduct are in fact enforced by factors external to the

independent states, and therefore may be described as law since any rule enforced by external factors is law. "International Law in Legal Education," J. B. Scott, 4 *Col. Law Rev.* 409. "The Binding Force of International Law," A. Pearce Higgins (1910). See review in 11 *Col. Law Rev.* 699, and 5 *Amer. J. Int. Law*, 850. "The Legal Nature of International Law," James Brown Scott, 1 *Amer. J. Int. Law*, 8, 31 et seq. "The Influence of Christianity on Law of Nations," 2 *Ward, Hist.*, (Dublin, 1795) 1 et seq. "The Development and Formation of International Law," Ernest Nys, 6 *Amer. J. Int. Law*, 1 et seq., 279 et seq. "The Influence of the Law of Nature upon International Law in the United States," Jesse S. Reeves, 5 *Amer. J. Int. Law* 547 et seq. "The Reconstruction of International Law," Franz von Liszt, 64 *Univ. of Penna. Law Rev.*, 765. "International Justice," James Brown Scott, 64 *Univ. of Penna. Law Rev.*, 774.

⁸ "The Sanction of International Law," Amos J. Peaslee, 10 *Amer. J. Int. Law*, 328 et seq.

SCOPE AND APPLICATION OF INTERNATIONAL LAW.

§112. There is great confusion among the writers in an attempt to define the scope and application of international law. The scope and application which is thus referred to is really a description of the operation of the international factors of conduct, and since international law is a conception in terms of order of the conduct of certain bodies as determined by those factors, our attention will necessarily be confined to the bodies so subject. The application of these factors to the conduct of independent states, therefore, determines the limits of our inquiry. There are certain independent states which are said not to be within the scope of international law, not to be subject to international law, etc. An examination of these bodies and of their peculiar situation will more clearly illustrate the principle that what we are really discussing is the operation of international factors of conduct and not the abstract conception of law.⁹ A state is a member of the family of nations when it is responsive to an equal extent with the other states to the factors determining the conduct of independent states. Since there are factors, external and internal, determining the conduct of independent states, and these factors operate equally on each state, it follows that if a state is in such circumstances that it cannot and will not respond to an equal extent with the other independent states to these factors, it cannot fully participate in international life with them. States, therefore, which are barbarous and uncivilized, and are without commerce, and the public opinion corresponding in a measure to the international public opinion of the civilized states of the world, are not in a position to participate equally with the other independent states in the

⁹ Hershey, *Int. L.*, (1912) 96, says that some publicists say that the scope of international law is as wide as humanity itself and its range extends over the whole earth. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 30, entitles his discussion "Dominion of the Law of Nations," and says "Dominion of the law of nations is the name given to the area within which international law is applicable, that is, those States between which international law finds validity," and then considers the question of what states are subjects of the law of nations,

whether only Christian or whether Christian and all others, and concludes that it is Christian and some others. There is objection to the use of the word "dominion" and the word "area" in discussing the application of law. Area seems to imply space but law applies only to conduct and has no reference whatever to space. The learned professor's idea that law is law between the states, that is, fills up spaces between the states, is, it is believed, entirely out of place.

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benefits of international life.¹⁰ Such a state will not be responsive to the same factors which will determine the conduct of other independent states. This is a somewhat difficult point to apprehend. The independent civilized states of the world show in their relations with each other a state of warfare and violence which is but little removed from barbarism. It therefore seems somewhat peculiar to say that a state participating in such a rough and tumble life can set itself up in any way superior to a barbarous state, such as, for instance, Afghanistan, Persia, Patagonia, Ethiopia, etc., or the Barbary States as they were in 1800. The facts remain, however, that these independent civilized states, in spite of their continual fighting, are subject to the external factors determining state conduct, and even in their wars, to a greater or less extent, conform their conduct to the rules of international law. There is, therefore, an appreciable or measureable conformity with international law, hand in hand with frequent instances of its disregard and violation. We must, therefore, in considering this aspect of the subject, shut our eyes to the violations of international law by independent civilized states, and recognize that the barbarous state would not conform to international law even to so great an extent as these independent civilized states. This has been illustrated by numerous instances in history, and therefore it has been necessary for the states comprising the family of nations to adopt towards these communities a somewhat different attitude.¹¹

Since a dependent state has no freedom of international action, it cannot freely adjust itself to the current of international life. Its conduct, therefore, depends on the will of the state on which it depends and is the conduct of that state. The only conduct we are studying is international conduct, and the conduct of independent states only is therefore the subject of our discussion. Independent states can only be expected to look to other independent states for redress for state acts. It would be footless for a state to call a

¹⁰ What has been called reciprocating will, 1 Lorimer, *Inst.* (1883-4) 109 et seq., reciprocating power, 1 Lorimer, *Inst.* (1883-4) 133 et seq.

¹¹ "In their intercourse with distant and weak states there has been too much disposition among the states of Europe to avail themselves of that law (law of nations) when it has been in their favour and to repudiate its obliga-

tions when it would have been against them;" Manning, *Int. L.*, 2 ed. Amos. (1875) 88n; See Woolsey, *Int. L.*, 6 ed. (1897) 4. International law is not confined to Christian States or members of the family of nations; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 20-23; see Lawrence, *Int. Law*, 5 ed. (1913) 57, 58.

Subjects and Objects of International Law

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dependent state to account and have the latter answer that it was subject to another state, to which the complaining state must look for redress. The scope and operation of international law is therefore the scope and operation of the international factors of conduct. There is another ambiguity in this connection which should be noticed. It is sometimes said that the rules of international law apply to land, open sea, vessels, etc.¹² The factors of international conduct can operate only on the bodies of the independent states and may determine their conduct as to land, the open sea, vessels, but cannot affect or in any way determine the conduct of such objects.

SUBJECTS AND OBJECTS OF INTERNATIONAL LAW.

§113. An object is anything which comes within the cognizance of the senses and when used in connection with the word activity indicates that which is affected by the action or to which the action is directed. A subject is a body under the power of another. Since international law is an abstract conception, it can have no subject and no object. The writers, however, constantly use these words as applicable to various things which they conceive to be the subjects or objects, as the case may be, of international law. An independent state is undoubtedly subject to the international factors of conduct, but not subject to any abstract conception of law. The word "subject" therefore is properly applicable to those bodies, and since the international factors of conduct connote activity, that is, the activity of the factor, the thing which is affected by that activity, to-wit, an independent state, is properly described as an object. When, therefore, we accurately use these words, we find that an independent state is as well the object as a subject of international factors of conduct and is neither of international law. It is said, for instance, that states are the subjects of international law, and individuals the object. The use of the words "subject" and "object" in this connection betrays a failure to keep in mind the exact nature of law.

¹² Thus, Hershey, *Int. L.*, (1912) 171, says that the objects of the law of nations are (1) Material goods and things; (2) Individuals or persons (including corporations), and that the main things to which the rules of international law apply are land territory, the open sea, vessels, and other public property of various sorts. See §98,

ante, on territorial jurisdiction. A tempest may sweep a vessel from her moorings but if the port regulations require that she be moved, that can only be accomplished by the act of individuals whose conduct, with respect thereto, is determined by the external factor of the political power of the state.

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Position of Individuals

Subject and object necessarily imply action of some sort, the one—the doer of the act, the other—the end or thing to which the act tends or upon which it operates.

We have referred in the note to some of the current views as to what are objects and subjects of international law.¹³

POSITION OF INDIVIDUALS IN INTERNATIONAL LAW.

§114. An individual is always subject to the political power of some state except in the rare case where he throws off political restraint and ventures in the international world alone.¹⁴ He is

¹³ States, subjects Hershey, Int. L., (1912) 92; Lawrence, Int. Law, 5 ed. (1913) 54, 76; 1 Phillimore, Int. L., 3 ed. (1879-1888) 79, 213; Wheaton, Elements, Dana's ed. (1866) 29, 30. Nations, subjects Twiss, L. of Nations, Peace, 2 ed. (1884) 145; Wheaton, Elements, Dana's ed. (1866) 29, 30. Envoys objects not subjects, 1 Oppenheim, Int. L., 2 ed. (1912) 455, 456. Fugitive criminal, from certain point of view, object Hershey, Int. L., (1912) 263. Individuals, corporations objects not subjects: Hershey, Int. L., (1912) 236; 1 Oppenheim, Int. L., 2 ed. (1912) 362, 363. Individuals, subjects see authors referred to Hershey, Int. L., (1912) 92n². Private corporations, subjects Wheaton, Elements, Dana's ed. (1866) 30, 31. Princes, subjects Wheaton, Elements, Dana's ed. (1866) 31, says "The peculiar objects of international law are those direct relations which exist between nations and states." The objects consist of the rights which are to be ascertained, protected and enforced by international law; 1 Phillimore, Int. L., 3 ed. (1879-1888) 79, 213. The rights of individual states and their sovereigns constitute the subjects of international law; 1 Wildman, Int. L., (1849) 38. Material goods and things objects Hershey, Int. L., (1912) 171. The open sea an object, 1 Oppenheim, Int. L., 2 ed. (1912) 323.

See 1 Lorimer, Inst. (1883-4) 15, who says the general object of international law is liberty. "The proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independence, and the test of their Independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities and to regulate the mode of discharging those obligations without the consent of any Political Superior, the rules which result from their mutual relations, and which govern their intercourse, resolve themselves into Natural rules and Positive rules, and the aggregate body of those rules, which admit of being enforced, constitute the Law of Nations in the most extensive sense of the term. The Law of Nations accordingly divides itself into Natural or Necessary Law, and Positive or Instituted Law;" Twiss, L. of Nations, Peace, 2 ed. (1884) 145. Hall, Int. Law, 6 ed. (1909) 17, speaks of the capacity in a corporate person to be subject to law as depending on the existence of a sense of right and of a sense of obligation to act in obedience to it either on the part of the community at large or at least in the man or body of men in whom the will governing the acts of the community resides.

¹⁴ Zouche, L. of Nations (1650), Carnegie ed., Part II. V. 1.

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therefore not in any way affected by the international factors of conduct because he is subject to a factor, to-wit, external superior political power, which does not exist in the international world, and which factor, by its operation, shuts him entirely out of international life. The political canopy of the individual's own state protects him from international life, and all its incidents and that canopy intercepts the international factors of conduct before they can reach him. An individual is touched with international life, if at all only as a member of an independent state and not in any other capacity. The discussion relates solely to the conduct of independent states, and they are distinguished because they are the only bodies in existence having no political superior power, and every other body and all individuals in the world are subject to such political power. It follows, therefore, that there is a vital distinction between the exercise of that political power by the state and the aspect of that state with respect to non-existence of political power by any other body. The distinction is between municipal life with political jurisdiction, and international life and lack of political jurisdiction.¹⁵ The position of an individual in international law has given rise to considerable speculation among the writers who have elaborately discussed the question whether he has any rights in international law.¹⁶ This is another of the many instances of the use of the ambiguous word "right." We shall point out that a state has no right at all except when we use that word in the sense of an interest or of power. The individual, therefore, in so far as he appears or acts through his own state, has also no rights except as that word is used to describe an interest or power.

RIGHTS IN INTERNATIONAL RELATIONS.

§115. The word "right" is used in several different senses,¹⁷ among which are: (A) power,¹ (B) interest, (C) potentiality of having redress afforded by the political power of the state, (D) that which is just. Where interest or power is meant, these words will be substituted for right. There is no occasion for retaining such an ambiguous term, and it will accordingly be discarded, although reference will sometimes be made to its use by the writers. No reader of

¹⁵ Lawrence, *Int. Law*, 5 ed. (1913) 72, et seq.; 2 Lorimer, *Inst.* (1883-4) 131; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 362, et seq.

¹⁶ See n. 15, *supra*.

¹⁷ See §29, *ante*, on rights.

¹ Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans. I. c. I. V.*; Vattel (1758) *Chitty's Trans. Book I* §95.

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Rights

international law can fail to be struck with the utterly inadequate discussion of the so-called rights of states which is found in the writers. The discussion always begs the question by assuming that there is a right, and then without defining it, enumerating what the writer conceives may be done in the exercise of that right. Many writers, perhaps the majority, adhere to the notion that a state has a right, and classify under various names, which are appended in the note, what they call the rights of states.² The learned authors are sometimes describing the interests of a state and use the word "right" in that sense, or they are sometimes describing the powers of a state and using the word "right" in that sense, a loose use of language which is only too prevalent among writers on international law and legal philosophers.³ A distinction was formerly drawn between perfect and imperfect rights. A perfect right was said to be accompanied by a power of compulsion, and an imperfect right was unaccompanied by any such power. The only compulsion in international life is self-help, the exercise of which lies solely in the discretion of the state concerned.⁴ The distinction, therefore, is without weight and has been discarded by some writers.⁵

² For references to conflicting views on the subject of rights, see Hershey, *Int. L.*, (1912) 143, n¹.

³ The conventional classification of rights with the real equivalents is shown in the following table:

Right of Self-preservation = self interest
plus power of protecting that interest.

Right of Possession = interest and power.

Right of Jurisdiction = power.

Right of the Sea = interest in and power
over the sea.

Right of Legation = power of sending
an envoy.

Right of Treaty = power of making a
treaty.

Right of Intercourse = power of inter-
course.

Right of Civil and Criminal Legislation
= power of legislation.

Right of Equality = fact of equality and
interest in being equal.

Right of Respect = interest in self and
power to compel others to respect
that interest.

Right of War = power to make war.

See generally as to the above: Hall, *Int. Law*, 6 ed. (1909) 43, et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 100, 125, 156, 198, 288; Hershey, *Int. L.*, (1912) 155, et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 213; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 178-440; 1 Westlake, *Int. L.*, 2 ed. (1910) 306; Wheaton, *Elements*, Dana's ed. (1866) 89, et seq.; 1 Wildman, *Int. L.*, (1849) 2; Wilson, *Int. L.*, (1910) 55, et seq.; Wilson & Tucker, *Int. L.*, (1901) 55, et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 15, et seq.

⁴ Vattel, (1758) Chitty's *Trans. Prelim.* §17. These authors retain conception of perfect and imperfect right: 1 Halleck, *Int. L.*, 4 ed. (1908) 471, 472; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 12, 13; 1 Westlake, *Int. L.*, 2 ed. (1910) 156.

⁵ Hershey, *Int. L.*, (1912) 143, n¹, says now generally abandoned, but cites no authority.

Responsibility of States

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CRIMINAL GUILT OF STATE.

§116. The question has been raised by a number of writers whether a state can be guilty of a crime. It seems that it cannot in any sense in which the word "crime" is used in municipal law. In that jurisdiction, a crime is an act punishable by the political power of the state. The word "crime," may be used in an ethical sense, as designating an act whether it is or is not punishable by the political power of the state. From the point of view of ethics, therefore, we may designate the acts of state as criminal, but since there is no political power superior to the independent states of the world, it seems inadmissible to designate such act as a crime in the sense in which that word is used in the municipal law.⁶

RESPONSIBILITY OF STATES.

§117. The word "responsibility" is used in several slightly different senses: (A) as meaning the circumstance of being subject to some external factor determining conduct. Thus, if I murder my neighbor, I am responsible to the political power of the state. This is the meaning ascribed to the word by the writers, who say a state is responsible. They, however, involve themselves in the ambiguity raised by the use of the word "law," particularly when they speak of the legal responsibility of states. An independent state is subject to the external factors determining international conduct, and a writer therefore must use the word "law" as standing for the jural conception embracing all these factors or as defining the particular factor he has in mind as designated by the word "law." Any other course opens him to the well-founded charge of obscurity. The statement, therefore, that a state is responsible is predicted entirely on what the factors are and how the conduct is determined, and to what extent they are operative, and is therefore a merely identical statement. (B) The word "responsible" is used by English-speaking judges and lawyers in another sense, as referring to personal capacity to comply with the requirements of the external factor of political power. Thus, we speak of the irresponsibility of lunatics, infants and bankrupts; of the responsibility of a normal person and of a person of financial solvency. Here, the person is subject to the external

⁶ 1 Halleck, *Int. L.*, 4 ed. (1908) 59; 210; 1 Phillimore, *Int. L.*, 3 ed. (1879-Hershey, *Int. L.*, (1912) 161n²; 1 1888) 5; 3 Phillimore, *Int. L.*, 3 ed. Lorimer, *Inst.* (1883-4) 160 et seq.; (1879-1888) 58.
1 Oppenheim, *Int. L.*, 2 ed. (1912) 209,

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factor, but for reasons peculiar to himself, is unable to conform thereto, which inability may or may not be an excuse for such failure.⁷ In the case where the government of a state is decayed or incapable of properly performing its functions, the state is, for the time being, temporarily incapacitated from participation in international life. Some writers have gone so far as to say that the capacity of the state for international functions is dependent upon the form of the government, and that an autocracy is such a form of government as precludes the state from a proper participation in international life.

ORIGIN OF INTERNATIONAL LAW.

§119. The discussion of the origin of international law is involved in an indiscriminate use of the words "basis," "source," "origin," and in a failure to distinguish the various conceptions for which the word "law" is commonly used. Source means that from which any act, movement or effect proceeds, and is, accurately speaking, that which furnishes a first and continuous supply. Basis is that on which anything rests, its support or foundation, while origin is the commencement of the existence of anything, and does not involve the idea of any further supply from that source. It will now be in order to ascertain, if possible, how these words are properly applicable to international law. We have, therefore, (A) the origin of state conduct which is simply an historical fact, (B) the origin of the external factors of compulsion, (C) the origin of the mental apprehension or jural conception of state conduct. In municipal law, we have the external compulsion of the political power of the state, and

⁷ This is one of the many instances which make the writings on international law such strange reading to practical lawyers. A slight difference like this in the meaning of the word gives the whole discussion a different color. Responsibility in the municipal law is the normal state of affairs, and the case to which our attention is particularly called is the case where there is a departure from that normal state of affairs, that is, the case of irresponsibility. The same conception appears in popular usage when we speak of the irresponsibility of youth. Now the question is, is there any distinction between states with respect to capacity?

Every state is, as we have seen, a living organism having a government as its organ of participation in international intercourse. We may possibly say that such an organism without civilization, commerce or public opinion, is in fact incapable as an organism of participating equally with other states in international life. Such a distinction has been suggested in the exclusion of certain barbarous and uncivilized states from the scope of international law and from membership in the community of states. See Hall, *Int. Law*, 6 ed. (1909) 53, 214, 218, 220; Hershey, *Int. L.*, (1912) 161 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 206 et seq.

find it necessary to examine the origin of that political power. No such necessity confronts the student of international law because no such external factor exists in the international world. The origin of the other factors in the international world is clear. A self-interest of the state originates with its existence. The origin and growth of international public opinion, the origin and growth of ethical standards, the origin of pressure from other states will originate with the existence of other states. Influence of state conduct in the past is a matter of precedent. It is submitted that there can be no accurate idea of the origin of international law without a clear notion of its various elements. It is almost as impossible for the academic mind to conceive of law disassociated from ethics as it is for the practicing lawyer to form an idea of law without political power of a state to enforce it. Difficult as the intellectual feat is in each case, it must be performed before either can clearly understand the subject of international law. We have collected in the note a reference to the views of some of the writers. It appears from an examination of them that they all fail to distinguish the various elements for which the word "law" may stand, and most of them emphasize the ethical element and ignore that of precedent, self-help and force.⁹ This adjustment of conduct is as necessary to the life of the community of states as it is to individual life within a community. Necessity, therefore, is a powerful force impelling orderly conduct among independent states.¹⁰ Some writers base international law on common consent,¹¹ but no one has been able to point to any evidence of that consent. It is not that the states consent to law, but that they voluntarily exist in a community life, which life necessitates law. The law goes with the community life. It might as well be said that a man who rides a bicycle consents to balance himself. The balancing goes with the riding to which the consent is given.

⁹ Wheaton, *Elements*, Dana's ed. (1866) 3, says that the origin of international law must be sought in the principles of justice applicable to the relations of states, and the first inquiry, therefore, is—what are the principles of justice which ought to regulate such relations, that is to say, from what authority is international law derived? 1 Oppenheim, *Int. L.*, 2 ed. (1912) 4, says that international law in its origin is essentially a product of Christian

civilization. "The guiding motive or purpose of international relations should be utility or the satisfaction of collective needs and interests, whether intellectual, moral or material;" Hershey, *Int. L.*, (1912) 19. The word "should" indicates that the learned professor is advancing his opinion of the ethical basis of international law.

¹⁰ Lawrence, *Int. Law*, 5 ed. (1913) 3.

¹¹ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 16.

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There is this distinction, however, to be drawn as to the contract theory between municipal law and international law. Every individual comes into a community involuntarily—by being born into it; sometimes voluntarily—by moving in; but mostly by birth. It is therefore not possible to find in fact any consent, agreement or promise by any individual, express or implied, but in the case of states, the members of a community of nations do enter the body more or less voluntarily and by the express act of the members already in. There is no evidence of any promise made by any state at the time of its becoming a member, either express or implied, or of any understanding that such state shall abide by the rules of conduct obtaining within the family of nations. The state by adhering to the gregarious condition of independent states, thereby brings itself within the orderly conduct followed therein, and no case has arisen where any state has voluntarily left the community of nations.

We have the conception of conduct which we call law and the facts used in framing that conception. We may go as far back in the chain of causation as we please, with the danger of being diverted on the way into some collateral issue, a fate which has befallen many of the writers. The origin of law may be described as follows: Man exists as an animal and exhibits a gregarious instinct: hence the community life, hence external factors determining conduct arising from the presence of other men, among which is the political power of the state, hence a large community comprised of these other communities in which there is no superior political power to determine conduct, hence the legal philosopher endeavoring to frame a theory of the facts, hence a difference of opinion as to what to call the mental conception.¹²

SOURCES OF INTERNATIONAL LAW.

§120. Source means that from which any act, movement or effect proceeds. The word is used to describe the natural facts of the physical world, as the source of a river. It is used by historians as describing the documents from which a knowledge of history is derived, and in the latter case it is obvious that the documents are not the source of historical facts themselves, as the spring is the source

¹² Hershey, *Int. L.*, (1912) 17-19, says that international law is ultimately based upon the innate or inherited sociability of human nature directed by specific human needs and interests. That the guiding motive or purpose of

international relations should be utility or the satisfaction of collective needs and interests, whether intellectual, moral or material. Social utility is the ultimate test of international as well as of all human law.

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of a river. The writers, however, fail to make this distinction and describe the source of international law in a very confusing way.¹³ The various treaties, statutes, judicial decisions, acts of state, to which they refer, are simply historical facts from which we may learn what state conduct in the past has been and how it has been influenced by any of the external factors determining state conduct. The opinions of the writers have more or less weight according to the authority of the authors and extent to which the opinion conforms to the actual necessities of international life. Some of the views as to the source of international law are collected in the note.¹⁴ Since international law is a mental conception of international conduct as determined by certain factors, the source of that conception will be the conduct and the factors, which latter, however, will have their source in the facts of human existence.

¹³ "'Source of Law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 21; Manning, *Int. L.*, 2 ed. Amos. (1875) 66n.

¹⁴ Hall, *Int. Law*, 6 ed. (1909) 5, takes the view that the evidence of international law is to be found in such international usage as can be looked upon as authoritative. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 60-68, gives the sources of international law as follows: (1) Divine law; (2) History; (3) Roman civil law; (4) Decisions of prize courts; (5) Judgments of mixed tribunals; (6) Ordinances and commercial laws; (7) Decisions of local courts; (8) Works of text writers of approved authority; (9) Treaties and compacts; (10) State papers and diplomatic correspondence. According to Hershey, *Int. L.*, (1912) 19-24, the primary sources of positive international law are: (1) Custom, based on tacit consent and imitation, and (2) Convention or express agreement by means of treaties; and he says that the evidences or witnesses of international law are the places where law as applied or agreed upon is found, or the docu-

ments which bear evidence or witness to existing principles and customs. He mentions: (1) treaties, (2) judicial decisions, (3) unilateral state acts, (4) opinions of statesmen, (5) writings of eminent jurists, and (6) histories of international relations. Lawrence, *Int. Law*, 5 ed. (1913), 98-114, says five sources: 1. Works of great publicists. 2. Treaties. 3. Decisions of prize courts, international conferences and arbitral tribunals. 4. International state papers other than treaties. 5. Instructions issued by states for the guidance of their own affairs and tribunals. Lawrence, *Int. Law*, 5 ed. (1913) 97, says source may mean: 1. The beginning of law as law, clothed with the authority required to give it binding force, in which case the only source of international law is the consent of nations. 2. The place where its rules are first found, whether in an authoritative or unauthoritative form. "The word 'source' . . . as applied to law has, at the least, two distinct meanings, which, however, are clearly connected. The one is that of the quarter to which recourse must be had to know what a rule of law is. The other is the immediate fact or group of

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facts which originally called a rule of law into existence. It is a peculiarity of the Law of Nations that, in reference to it, the two meanings are scarcely distinguishable;" Manning, *Int. L.*, 2 ed. Amos. (1875) 66, n. Manning, *Int. L.*, 2 ed. Amos. (1875) 66 et seq., discusses the sources of the law of nations and says that the obligations on which that law is based consist of (a) natural law, with which the right obligation of the principle of utility is identical; (b) obligations arising from custom; (c) obligations arising from convention, and compares to these three headings of equity, common law and statute law. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 22, says that there are two sources of international law: (1) Express consent, as a treaty laying down rules for future conduct; (2) Tacit consent, which is given where states have adopted the custom of submitting to certain rules of international conduct, and that treaties and custom are therefore exclusively the sources of the law of nations. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 1, 68, recapitulates a rather rambling and somewhat confused discussion of the sources of international jurisprudence by saying that the sources from which that jurisprudence is derived are:

- (1) Divine law, of which two branches:
 - (a) Principles of eternal justice implanted by God in all moral and social creatures, including governments.
 - (b) Revealed will of God.
 - (2) Reason which governs the application of these principles.
 - (3) Universal consent of nations expressed by:
 - (a) Positive compact or treaty,
 - (b) Implied usage, custom and practice, which are evidenced by
- Precedent, recorded in history,

Treaties,

Public documents of states,

Marine ordinances,

Decisions of international tribunals,

Works of eminent writers.

Phillimore, *Int. L.*, 3 ed. (1879-1888)

Vol. 1, 45, says that the history and treaties are the repositories and evidence of usage, the great source of international law, and, on p. 46, quotes Grotius as saying that incidents recorded in history do not merely by virtue of being so recorded constitute precedents of international law; that such incidents are bad or good. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 14, says that custom and reason are the two sources of international law. Wheaton, *Elements*, Dana's ed. (1866) 23, et seq., says the various sources are:

- (1) Text writers of authority, (2) Treaties, (3) Ordinances of particular states prescribing rules for the conduct of their commissioned cruisers and prize tribunals, (4) Adjudication of international tribunals, such as boards of arbitration and courts of prize, (5) Written opinions of official jurists given confidentially to their governments. (These he calls another depository of international law, but has not used the word "depository" with reference to the former headings.) (6) History of wars, etc., and other transactions relating to the public intercourse of nations. Woolsey, *Int. L.*, 6 ed. (1897) 28, says the helps for ascertaining what international law is or has been may be derived principally from the following documents: (1) The sea laws of various ports, (2) Treaties in which a large number of important nations have a part, (3) Judicial decisions, (4) State papers on controverted points, (5) Treaties which with reason or by accident, have acquired standing above others. The following emphasize the influence of the Roman Law: 1 Philli-

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KINDS OF INTERNATIONAL LAW.

§121. Various kinds or rules of international conduct have been described by the authors, some of which, when closely examined, are seen to reflect the particular views as to the special factor of compulsion influencing state conduct which is in mind. Others attempt to set up the conception that there are different divisions of international law irrespective of any external factors involved and applicable to particular classes of states. Others, under the guise of different terms, put forward some theory as to the nature of international law. Some of the terms which have been used are as follows: Actual,¹⁵ Administrative,¹⁶ American,¹ Common,² Conventional,³ Customary,⁴ Comity,⁵ European,¹ General,⁶ Ideal,¹⁵ Morality,⁷ Natural,⁸ Necessary,⁹ Positive,¹⁰ Real,¹⁵ Particular,⁶ Theoretical,¹⁵ Universal,¹¹ Voluntary.¹² These distinctions are unnecessary, and,

more, Int. L., 3 ed. (1879-1888) 30, et seq.; 1 Westlake, Int. L., 2 ed. (1910) 15. For further discussion, see 1 Lorimer, Inst. (1883-4) 19, et seq.; 1 Phillimore, Int. L., 3 ed. (1879-1888) 643; Twiss, L. of Nations, Peace, 2 ed. (1884) 145-177; Vattel, (1758) Chitty's Trans. Prelim. LV.

¹⁵ *Actual and Theoretical Real Ideal*: This is modern terminology and differentiates the law which it may be supposed does exist from the law which in theory should obtain. It is as impossible to form an accurate idea of the rules of international law which in fact prevail as it is for writers to agree on the law which ought to prevail. The distinction is obviously impossible of application. See Hershey, Int. L., (1912) 1n¹.

¹⁶ *Administrative*: International Administrative Law—a branch of international jurisprudence which is still in its infancy—has been tentatively defined as “that body of laws and regulations created by the action of International Conferences or Commissions which regulate the relations and activities of national and international agencies with respect to these material and intellectual interests which have re-

ceived an authoritative universal organization.” It relates to such matters as international communication by means of postal correspondence and telegraphy, international transportation, copyright, crime (e. g. the white slave traffic), sanitation, etc. It is created by International Congresses or Conferences, and Commissions, and is administered by International Commissions and Bureaus as well as by national agencies;” Hershey, Int. L., (1912) 5.

¹ *American and European*: It has been supposed by some writers that there is a difference between the international law in America and in Europe. No such distinction has in fact been pointed out, and it seems undesirable to perpetuate such an idea. The independent states of the world form one community; Hershey, Int. L., (1912) 1n¹.

² *Common*: Since there is no statutory international law, the word “common” is inadmissible as designating any part of that law, and can be used with accuracy only as applying to all international law. The word is useless in this connection in practice or in theory.

³ *Conventional International Law*:

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Manning, Int. L., 2 ed. Amos. (1875) 86, 87. "The conventional law of nations results from the stipulations of treaties and consists of the rules of conduct agreed upon by the contracting parties;" 1 Halleck, Int. L., 4 ed. (1908) 54, 55. Conventional law of nations is sometimes spoken of as the diplomatic branch of the law of nations; Twiss, L. of Nations, Peace, 2 ed. (1884) 163. See §120, ante, on sources of international law. See §399, post, on law making effect of treaties. "The conventional law of nations resulting from compacts between particular States," Wheaton, Elements, Dana's ed. (1866) 15.

⁴ *Customary*: "The customary law of nations is founded on the tacit or implied consent of nations as deduced from their intercourse with each other;" 1 Halleck, Int. L., 4 ed. (1908) 55. For discussion of customary law, see 1 Halleck, Int. L., 4 ed. (1908) 55; Manning, Int. L., 2 ed. Amos. (1875) 78; 1 Oppenheim, Int. L., 2 ed. (1912) 17, 22; 1 Phillimore, Int. L., 3 ed. (1879-1888) 38 et seq.; Twiss, L. of Nations, Peace, 2 ed. (1884) 158 et seq.; Wheaton, Elements, Dana's ed. (1866) 15.

⁵ *Comity*: "International comity relates to those rules of courtesy, etiquette, or goodwill which are or should be observed by Governments in their dealings with one another on the grounds of convenience, honor or reciprocity;" Hershey, Int. L., (1912) 3. "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or

of other persons who are under the protection of its laws;" Gray, J., in Hilton v. Guyot, 159 U. S. 113 at 164 (1894). "Comity, as generally understood, is national politeness and kindness. But the term seems to embrace not only that kindness which emanates from friendly feeling, but also those tokens of respect which are due between nations on the ground of right;" Woolsey, Int. L., 6 ed. (1897) 23. See 1 Oppenheim, Int. L., 2 ed. (1912) 25.

⁶ *General and Particular*: This distinction attempts to differentiate the law generally obtaining among all states from the law applicable to a few particular states. No attempt appears to have been made to apply the distinction and it may be dismissed as of no value. Hershey, Int. L., (1912) 1 n¹. 1 Oppenheim, Int. L., 2 ed. (1912) 3.

⁷ *Morality*: Hershey, Int. L., (1912) 2, says: "International morality deals with the principles which should govern international relations from the higher standpoint of conscience, justice or humanity." The notion of international morality is referred to by a number of the writers but, as we have already pointed out, is entirely inadmissible in a legal treatise. See §105, ante. Woolsey, Int. L., 6 ed. (1897) 15.

⁸ *Natural*: "The Natural Law of Nations is founded on the Nature of Independent States, as such, and is the result of the relations observed to exist in Nature between Nations as Independent Communities;" Twiss, L. of Nations, Peace, 2 ed. (1884) 146. "Natural Law, according to Puffendorf, is that which is so exactly fitted to suit with the rational and social nature of man, that humankind cannot maintain an honest and peaceful Fellowship without it;" Twiss, L. of Nations, Peace, 2 ed. (1884) 146n¹. "The Natural Law is, according to Woolsey, Int. L., 6 ed. (1897) 11, the

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it is submitted, unsound. If international law applies to all independent states, it must have the character of continuity and universality. International law is a body of rules all having the same quality and nature. There can be no distinction in this respect between them. The only distinction is that some of them are strong and more generally observed than others. The writers who make these fanciful distinctions never attempted to apply them. After stating them, they proceeded with the subject as if these distinctions did not exist. A distinction which is never applied and has no material value may well be disregarded. Customary divisions of international law proceed upon an apprehended distinction in the quality of the laws or their binding effect.¹³ Some are supposed to be more binding than others. Since we have a spectacle of law in the making that is the development of rules of law, it is tempting to attempt to classify

product of natural reason and ought, since men are alike in their sense of justice, to be everywhere substantially the same." See "History of the Law of Nature."—Frederick Pollock, 1 Col. Law Rev., 11, et seq.; 2 Col. Law Rev., 131, et seq. "Law of Nature as determining the objects of the Law of Nations;" 1 Lorimer, Inst. (1883-4) 19; Maine, Ancient Law, 3 American Ed. (1888) 70 et seq.; Manning, Int. L., 2 ed. Amos. (1875) 66 et seq.; Twiss, L. of Nations, Peace, 2 ed. (1884) 146-155; Wheaton, Elements, Dana's ed. (1866) 5 et seq.; Woolsey, Int. L., 6 ed. (1897) 11 et seq.

* *Necessary*: "We call that the necessary Law of Nations which consists of the application of the Law of Nature to Nations." See Vattel, (1758) Chitty's Trans. Prelim. 7. Woolsey, Int. L., 6 ed. (1897) 25, objects to Vattel's distinction of international law into natural or necessary and positive law. See 1 Halleck, Int. L., 4 ed. (1908) 56; Twiss, L. of Nations, Peace, 2 ed. (1884) 148; Wheaton, Elements, Dana's ed. (1866) 14.

¹⁰ *Positive*: "These three kinds of law of nations, the voluntary, the con-

ventional and the customary, together constitute the positive law of nations;" Vattel, (1758) Chitty's Trans. Prelim., 27. "The positive law of nations, on the other hand, is based on the consent of nations and is the result of the relations instituted between them by their own free will;" Twiss, L. of Nations, Peace, 2 ed. (1884) 146. See 1 Halleck, Int. L., 4 ed. (1908) 53 et seq.; Woolsey, Int. L., 6 ed. (1897) 3 et seq.

¹¹ *Universal*: Universal International Law binding on all civilized states without exception; 1 Oppenheim, Int. L., 2 ed. (1912) 3. See Hershey, Int. L., (1912) 1 n¹.

¹² *Voluntary*: According to Woolsey, Int. L., 6 ed. (1897) 5, voluntary law seems to be such because it is so by consent of nations. See Twiss, L. of Nations, Peace, 2 ed. (1884) 146 et seq.; Wheaton, Elements, Dana's ed. (1866) 12, et seq.

¹³ Halleck, Int. L., 4 ed. (1908) Vol. 1, 51, adopts division as follows: International Law:

(a) Natural Law of Nations.

Divine Law.

Application of the law of God to States.

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Science of International Law

them according to the stage of their development, but in such a classification it is impossible to draw a clear-cut line and make an accurate distinction between the various stages of the development, just as we cannot draw a line in the development of the chrysalis into the butterfly.

SCIENCE OF INTERNATIONAL LAW.

§122. The science of international law is the systematic study of the conduct of independent states, which is nothing more or less than the philosophy of international law. It is an attempt to arrange the juristic conception of that conduct according to orderly and systematic arrangements, in which attempt the thinker may be influenced by the various notions of the external factors upon conduct which we have described. We may think of that conduct exclusively in terms of one factor and ignore the others. This is the attitude generally pursued by most of the writers on the subject. The invention of the word "science" is only another illustration of the fondness of the writers for multiplying words.¹ There is in every system of

- (b) Positive Law of Nations.
 Conventional Law.
 Customary Law.

Normal rights and obligations of states:

Law of Peace

- (1) Rights and obligations connected with Independence.
- (2) Rights and obligations connected with Property.
- (3) Rights and obligations connected with Jurisdiction.
- (4) Rights and obligations connected with Equality.
- (5) Rights and obligations connected with Diplomacy.

Abnormal rights and obligations of states:

Law of Belligerency

- (1) Rights and obligations connected with Belligerency.

Law of Neutrality

- (2) Rights and obligations connected with Neutrality;

Lawrence, *Int. Law*, 5 ed. (1913) 117.
 Woolsey, *Int. L.*, 6 ed. (1897) 26,
 divides the rights and obligations

known to the science of international law into: (1) those which are deducible from natural *jus* which no action of sovereignty began or can terminate; (2) those deducible from the idea of a state; (3) those which are begun and can be ended by compact, express or tacit. He makes another division which closely follows the division of the three grounds or reasons for international rules, namely, *jus*, morality and convenience. He says the first class comprehends the rights and obligations which can be defined and enforced; the second, duties and moral claims which cannot be easily defined and need compact to establish them, and the third, arrangements of a purely voluntary nature.

¹ "The Science of the Law of Nations may be accordingly defined to be the Science of the Rules which govern the International Life of States;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 2; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 152, 153; Walker, *Science, Int. L.*, (1893) 91-111.

law a time when it begins to be consciously studied and written about and men begin to think what law is. In most systems of municipal law we can only imperfectly apprehend the exact point of the beginnings of such studying. In international law, however, we are able, with tolerable accuracy, to ascertain the beginning of the study of international law, or the beginning, as it is called, of the science of international law.² The systematic study of international law began probably as early as the sixteenth century, and the first recognized exponents of the learning appeared in the early part of the seventeenth century. This study was a study of the law as it applied to facts which had been unknown to Western Europe in fact and in theory for many centuries. These facts were the existence of independent states. These states arose as an economic development of the life of Europe entirely apart from any postulate of international law. The growth of the states created the conduct, of which it became necessary to form a jural conception, hence the states were antecedent to law, just as man is antecedent to the municipal law.

HISTORY OF INTERNATIONAL LAW.

§123. No adequate history of international law has been written in English. The subject requires a volume in itself, and such an historical discussion would be entirely out of proportion in a systematic treatise on international law as it exists at the present time. No such discussion will therefore be attempted here. Such a history will involve a history of international conduct, sometimes referred to as (A) a history of international relations; (B) a history of the philosophy of international law, which should trace the historical appearance and development of the various ideas which have influenced international law. The following general observations seem to be in point: The discussion will trace the historical development of international law during various epochs of the existence of independent state life, and point out the influence of various factors and different economic development. International commerce will, no doubt, be found to play a leading part in this development. A

² This fact should be kept in mind because many persons speak of the beginning of international law in the seventeenth century, and say that international law is scarcely three hundred years old. Such philosophers are,

of course, inaccurate. It is the conscious study of international law which is only about three hundred years old. For reference to views of the principal writers see Hall, *Int. Law*, 6 ed. (1909) 2, n¹.

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Private International Law Distinguished

chapter should be added on the influence of international public opinion on international law, showing how the general ideas of the world at large at different times have influenced not only the conduct of independent states, but also the prevailing conceptions of what such conduct should be. With these few general observations, we shall leave the subject for the attention of some scholar better equipped for the task than ourselves.³

PRIVATE INTERNATIONAL LAW DISTINGUISHED.

§124. Private international law or conflict of laws has to do with the circumstance that a member of one community or an interest of his comes within the political power of another community of which he is not a member. He may be affected by two different municipal laws. The question will arise—which of the two is to apply? There are two theories—one that the municipal court, of its own judgment, chooses which law shall apply; the other, that there is a principle of law applicable in all municipal courts determining in any given case what choice shall be made. If the second theory is applied, private international law is a part of international law, because the municipal court in rendering the decision

³ For discussions of the history of the science of the Law of Nations, see Hershey, *Int. L.*, (1912) 56, 91; Manning, *Int. L.*, 2 ed. Amos. (1875) 8 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 83-104; Wilson & Tucker, *Int. L.*, (1901) 6 et seq. "Historical Development," Wilson & Tucker, *Int. L.*, (1901) 12 et seq. "The History of International Relations During Antiquity and the Middle Ages," Amos S. Hershey, 5 *Amer. J. Int. Law*, 901 et seq. See Hershey, *Int. L.*, (1912) 26-55. "History of International Law since the Peace of Westphalia," Amos S. Hershey; 6 *Amer. J. Int. Law*, 30 et seq.; Hershey, *Int. L.*, (1912) 56-91. For accounts of the history of international law and discussions of the various theories, see 1 Halleck, *Int. L.*, 4 ed. (1908) 1-49; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 45-104. "Ward Foundation and History of the Law of Nations in Europe to the Age of

Grotius" (1795), Robert Ward. "History of International Relations before Grotius," Walker, *Science, Int. L.*, (1893) 57-90; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 155 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 6-10. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 4, says that international law, in the meaning of the term as used in modern times, did not exist during antiquity and in the first part of the middle ages. What is the difference, however, between the modern meaning and the ancient? If he means that the science of international law did not exist, he is correct; if he does not mean this, it is difficult to tell what he does mean. He also says (Vol. 1, p. 4) that it is a product of modern civilization and is four hundred years old and the roots go far back into antiquity. "The International Law and Custom of Ancient Greece and Rome," Coleman Phillipson (1911). See 11 *Col. Law Rev.* 489.

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makes the conduct of the state conform to that determined by some international factor operating on all independent states.⁴ There is a difference of opinion among the writers, and the subject will be omitted as it is usually discussed by itself, and its inclusion would destroy the proper proportion and balance of the work.⁵

MUNICIPAL LAW DISTINGUISHED FROM INTERNATIONAL LAW.

§125. The distinction between international law and municipal law is of importance.⁶ International law, as appears from the definition, relates to the conduct of independent states and is without any superior political power to enforce it. Municipal law is law which is or may be enforced by the political power of the state, and therefore can only obtain within the jurisdiction of a state.⁷ There are many analogies between the two systems of law, and many cases where the analogy breaks down. The use of analogy is always dangerous and subject to great caution. The same remark applies here.⁸

INTERNATIONAL LAW NOT A PART OF MUNICIPAL LAW.

§126. It is sometimes said that international law is a part of municipal law,⁹ and a number of learned essays have been written in answer to the question—is international law a part of municipal law? Now, in what sense can it be said that any body of law is a

⁴ "The distinction, however, between the two branches of International Jurisprudence is extremely important. It is this: The *obligationes juris privati inter gentes* are not—as the *obligationes juris publici inter gentes* are—the result of legal necessity, but of social convenience, and they are called by the name of Comity—*comitas gentium*. 1 Phillimore, Int. L., 3 ed. (1879–1888) 12, 13.

⁵ Hall, Int. Law, 6 ed. (1909) 51, et seq.; Hershey, Int. L., (1912) 4; Lawrence, Int. Law, 5 ed. (1913) 5; 1 Oppenheim, Int. L., 2 ed. (1912) 4; 1 Westlake, Int. L., 2 ed. (1910) 246, et seq.; Woolsey, Int. L., 6 ed. (1897) 102–109. "Grundzüge des Englisch-Amerikanischen Privat-Und Prozessrechts, Besonders in Vergleiche mit den Systemen des Europäischen Kontinents," (1915) Arthur K. Kuhn. See

10 Amer. J. Int. Law, 674. "A Treatise on the Conflict of Laws," Vol. 1, Part 1, (1916) Joseph Henry Beale. See 10 Amer. J. Int. Law, 665.

⁶ The term "municipal" is perhaps unfortunate, as this word is also applied to the law of municipalities. The term, however, is well fixed and understood in international usage, and too convenient to be discarded. With a little practice the learned reader will be able to divest the term of the more restricted meaning as relating to municipalities.

⁷ "Municipal laws are rules of conduct observed by men or by men recognized as binding towards each other as members of the same state;" Walker, Man. Int. L., (1895) 401.

⁸ Manning, Int. L., 2 ed. Amos. (1875) 91.

⁹ Snow Cases, (1893) 1–4.

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part of another body of law? All law applying to the conduct of the same bodies or the same class of bodies, as, for instance, laws applying to Englishmen or Frenchmen, or English laws applying to infants, lunatics,⁹ or laws applying to the conduct of persons with respect to property, are in each case bodies of law, that is, they are groups of legal principles distinguished from other legal principles by the difference in the objects to which they apply. It is perfectly obvious that the same rule of conduct may appear in two or more bodies of law, in other words the objects of different classes may so happen to be regulated by the same rule of conduct. For instance, it may be a rule in France to the effect that a person is of legal age on reaching twenty-one, and the same may be the effect of the rule in England. It therefore so happens in such case that the same rule applies in each body of law. It would obviously in such case be improper to say as to either of these bodies that the rule of one was a part of the other. It may be, and sometimes has happened, that a rule of law has appeared in one body of law, and then subsequently, for one reason or another, appeared in another body of law. In such case, it is said that the rule of law has been borrowed from or descended from the other body of law. The phrase is frequently used in the books applicable to such a state of affairs—that the foreign principle of law is part of the municipal law. Thus, we say of certain doctrines of the Roman law, of the law of merchant or the civil law, that in each case they are part of the common law of England. Now, this is obviously an inaccurate phrase describing the origin or place of the rule. The rule, itself, when applied by the court of the country, must be the rule of the law of that country and nothing else. A principle of law applied by an English court is, for the time being, to that extent, a rule of law of England, and while it may be conveniently distinguished from other principles of law because of its origin, it is, nevertheless, in spite of such loose phraseology, in fact nothing but a rule of law applied by an English court and therefore an English rule of law. It appears, therefore, that this phrase—that one law is part of another law—is inaccurate, and simply is used to describe an historical descent or borrowing; that, in point of fact, there can be no such thing as a part of one body of law being part of another body of law. Just as soon as the foreign rule of law is received into a state, it then becomes a part of the law of that state.

⁹ As to municipal law producing an international effect, see Hall, *Int. Law*, 6 ed. (1909) 608n¹.

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International law regulates the conduct of states, and municipal law that of individuals, consequently it cannot in any sense be accurately said that any rule of international law is ever a part of the municipal law. The true relation between the two bodies of law, it is submitted, is this: International law rests upon and regulates the conduct of independent states; municipal law upon the conduct of individuals within the state. For example, international law imposes on a state a duty of conduct with reference to the immunity of ambassadors, that is, the provision of international law is somewhat to this effect. No state shall interfere with the property or liberty of action or person of an ambassador while he is in the discharge of his official duties, nor shall any state permit any of its citizens to interfere with any such acts of an ambassador. The rule of international law cannot be addressed to the member of a state because he is not the subject of international law or within its purview. Accordingly, a state will prohibit any citizen from any such interference with an ambassador. The municipal law simply imposes on a member a prohibition which the state is bound to impose because of the application of international law resting upon it.

Every independent state is bound by international law to provide certain rules of municipal law within its boundaries. It may in fact provide otherwise, and when it does so, to that extent it violates international law. Many instances have occurred where such a municipal law has been adopted. What becomes then of the proposition that international law is a part of municipal law? A court of justice in deciding a controversy to which there is no municipal law applicable, will presume that the state would have enacted the proper rule of international law, and, by not acting, left it be understood that the municipal common law was in accordance with the obligation imposed on the state by the provisions of international law.¹⁰

¹⁰ This is the sense in which the language of the judges, quoted Hershey, *Int. L.*, (1912) 9-11, is to be understood. See *Snow Cases*, (1893) 1-4. International law does not have to be proved as a fact; 1 Moore, *Dig. of Int. L.*, (1906) 11. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 9, says that the conception of municipal law is narrower than that of law pure and simple, by which he probably means law in the abstract. "As soon as a nation has

assumed the obligations of international law, they become a portion of the law of the land to govern the decisions of courts, the conduct of the rulers and that of the people. A nation is bound to protect this part of law by statute and penalty as much as that part which controls the jural relations or in other ways affects the actions of individuals;" Woolsey, *Int. L.*, 6 ed. (1897) 27. This conception, however, perpetuates the inaccurate phrase—international

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Title of the Subject

So-called offenses against the law of nations, are, when accurately described, offenses against municipal law, which municipal law is enforced as a result of the international factors of conduct operating on the independent states.¹¹

TITLE OF THE SUBJECT.

§127. Several different titles have been used as a designation of the subject, as laws of war and laws of peace,¹² *droit des gens* or law of nations, a translation of *jus gentium*, *jus inter gentes*,¹³ law among nations, international law,¹⁴ interstate law,¹⁵ super-state law, intra-state law. Of all these phrases, international law is the most used, and while none of them are accurate, this phrase sufficiently indicates

law a part of municipal law, and introduces the novel idea that a state can protect law by statute. What is this law thus protected by statute? He may mean (1) that the statute enacts international law, which it can never do; (2) that the statute enacts what was before a principle only of the common law, which is possible but beside the controversy, because international law could never be a principle of the common law. Wilson, *Int. L.*, (1910) 15, says under the heading "Force of international law," that international law is part of the municipal law of states, thus entirely missing the point as to force, if that term can be used, because the question is as to the binding force of international law on the states of the world.

¹¹ Offenses against the law of nations cognizable by judicial tribunals are, according to Wildman, *Int. L.*, (1849) Vol. 1, 199, (1) Offenses against ambassadors; (2) Violations of safe conducts; (3) Libels against sovereign princes and eminent princes in foreign states; (4) Piracy.

¹² This was the title chosen by Grotius, and followed by many writers since. It, however, suggests an unsound distinction because war is a part

of remedial international law and not the only part.

¹³ Zouche, in 1650, first called the subject, "Jus Inter Gentes," but the phrase "law among nations" is due to the Chancellor d'Aguesseau; Thomas W. Balch, 64 *Univ. of Pa. Law Rev.* 113. See, however, Wheaton, *Elements*, Dana's ed. (1866) 20; Woolsey, *Int. L.*, 6 ed. (1897) 10. "Jus Gentium and International Law," Gordon E. Sherman; 12 *Amer. J. Int. Law*, 56.

¹⁴ The term "international law" was invented by Jeremy Bentham in 1780; Wheaton, *Elements*, Dana's ed. (1866) 20. "As, however, there cannot be a sovereign authority above the several sovereign states, the Law of Nations is a law between, not above, the several states, and is, therefore, since Bentham, also called 'International Law;'" 1 *Oppenheim, Int. L.*, 2 ed. (1912) 4. International Law has been objected to Wheaton, *Elements*, Dana's ed. (1866) 16. Hershey, *Int. L.*, (1912) 2, et seq., uses the term "International Public Law," after using "International law," thereby suggesting the title "International Private Law," or, as more commonly used, "Private International Law."

¹⁵ Interstate law has been suggested, see Hershey, *Int. L.*, (1912) 2, n³.

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the subject matter of the discussion to either the novice or the expert. It seems immaterial, as so many writers have done, to endeavor to accurately express in the title the precise nature of international law. It has been supposed by some that law of nations refers to the historical character or origin of law, and that international law applies to its jurisdiction and effect. This distinction is not settled in usage and may be ignored.¹⁶ Since nations are not bodies whose conduct is within the scope of international law, the title is incorrect and it would be more accurate to say independent state law.¹⁷

SUMMARY.

§128. Independent states are, as already has been pointed out, living organisms having inherent powers, the exercise of which is unrestrained by any external superior political power. There are, however, certain external factors determining the conduct of an independent state, the operation of which results in a certain amount of international order, and in studying those factors and their operation, we start with the fundamental fact of inherent organic power of the state, and inquire what those restraints are, how they may be described, and their operation known, which involves an inquiry into the definition and nature of international law.¹ A state has or may have interests just as an individual. The interests of a state are shown in the note.²

An independent state will be governed in its conduct by (a) self-interest, (b) inherent prejudice, (c) international public opinion,

¹⁶ As to title, see Hershey, *Int. L.*, (1912) 2; Wheaton, *Elements*, Dana's ed. (1866) 20, et. seq.

¹⁷ This obscurity referred to by Lawrence, *Int. Law*, 5 ed. (1913) 8.

¹ See §103, ante.

² A state will have the following interests:

- (a) An interest in itself, its territory, its activity, form of government and municipal law.
- (b) An interest in its officials when they venture forth from its jurisdiction, which will be
On the high sea,

Within jurisdiction of another state,

In jurisdiction of no state.

(c) An interest in its members beyond its borders, which will be

On the high sea,

Within jurisdiction of another state,

In jurisdiction of no state.

(d) An interest in another state, which other state may be independent or dependent.

(e) An interest in the open sea and territory not subject to the jurisdiction of any other state.

(f) An interest in the maritime belt.
See §104, ante.

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(d) custom, (e) pressure from one or more other states. The principles of ethics are excluded as they are so often overcome by the other factors that they are of little practical importance. These will be referred to as international factors of conduct, and they operate with varying force under different circumstances.³ The conduct of independent states as determined by these factors may be reduced to some semblance of order, just as in the case of conduct of individuals; and that conduct may be described in terms of the past, or present, or we may endeavor to predict what the conduct of an independent state will be under given circumstances at some definite time in the future. International conduct, under the influence of these various factors, tends to adjust itself along more or less determined lines, only these states are more self-conscious about the observance of any supposed rule of conduct which exists than is an individual in municipal life. The conception of that orderly conduct is a rule of independent state conduct.⁴

The only redress which a state will have for damage to one of its interests is by setting in motion the external factors influencing independent state conduct which have already been referred to. The self-interest of a state will be an internal factor in conflict with and sometimes in harmony with the other external factors.⁵ Since the independent state can only obtain redress by setting in motion such factors, it follows that redress may only be had against the body subject to these factors, to-wit, another independent state, and not therefore against an individual or a dependent state having no international function, or a subordinate division of a state, because all these bodies are subject to the political power of an independent state, and whatever action they may propose to take in the matter of such redress may be nullified by the act of the independent state on which they depend. An independent state, therefore, out of regard to its dignity, must deal with the principal in the first instance.⁶ International law is therefore the conception in terms of order of the conduct of independent states as determined by internal and external factors, which external factors exclude the forces of nature and superior political power.⁷ International law is a pure mental conception, just as law is. It can have no motive, purpose, object, or subject. The external factors may exhibit such effects but the conduct as determined by those factors can exist

³ See §105, ante.

⁴ See §107, ante.

⁵ See §106, ante.

⁷ See §108, ante.

⁶ See §107, ante.

only in the imagination of the thinker, although conduct itself, in fact, in small segments, may appear to the observer.⁷ The discussion of whether international law has a legal nature is involved in the hopeless ambiguity with which the word "law" is used by the writers, and upon examination amounts to this: municipal law is enforced by the political power of the state; international law is not, therefore it has no legal nature. To which the answer is made as follows: in each case there are external factors determining conduct, and the absence of one factor in one case, which is present in the other, does not make the conception of the factors any less law. The controversy is as to the meaning of the word law and not over the real difference which exists.⁸ There can be no sanction to international law in the sense in which that word is used in the municipal law as describing a penalty fixed by the power of the state.⁹

Since international law is a jural conception of the conduct of independent states, it follows that the conduct of independent states only is determined by the factors embraced in the definition. Dependent states, individuals and corporations are entirely outside the discussion.¹⁰

It was formerly supposed that states outside the family were not bound by international law, and states, members of the family, generally assumed toward them the same arrogant attitude that the knights of chivalry did toward the meaner persons not belonging to their order, a state of mind not entirely absent from some individuals in modern times.

The principle underlying this attitude, however, was that these barbarous states, because of their lack of civilization, commerce and sufficient self-interest, were not in a position to respond to the external factors determining state conduct to the same extent as were the independent states of the civilized world, and therefore there was a reason and necessity for considering them in a somewhat different way. This principle, however, did not excuse the Christian powers of Europe from the constant disregard of the territory and jurisdiction of these states which characterized the colonization movements of the 15th, 16th and 17th centuries.¹⁰

There can be no subject or object of international law, but the international factors of conduct operate on independent states, which may therefore be subjects of the factors.¹¹ An individual has no

⁸ See §110, ante.

⁹ See §111, ante.

¹⁰ See §112, ante.

¹¹ See §113, ante.

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position in international law, as he is subject to the political power of his own state or some other state in which he is, and cannot, therefore, appear in international life unless he ventures forth as a pirate on the high sea. The external factor of superior political power shuts him off from the international world and determines his conduct in a manner which effectually excludes him from the consideration of the international lawyer. He is of importance only as a member of an independent state in which capacity alone he is considered.¹²

The ambiguity of the word "right" has already been pointed out, and some of the senses in which the word is used referred to. The confusion caused by the use of the word in international law is intolerable, and it is little short of amazing that the able minds which have hitherto labored on the subject have been content to flounder so long in such an unspeakable quagmire.¹³

A state has an interest in its territory, but the writers say—has a right to its territory. The interest is protected by the external factors in international life and by nothing else, and the principal factor in such a case is the inherent force and strength of the state in question. It does not help matters to call this interest a right, indeed it only draws attention away from the principal feature, which is that the interest of the state is unprotected by superior political power, whereas, the similar interest in the municipal law, to which the word "right" is applied is protected by such superior political power. The two instances, therefore, are in different categories. It seems inadmissible to apply the word "right" to each of them indiscriminately. In like manner, an independent state has power, for instance, to make a treaty or send an envoy, a power exercised only by the inherent force of the state, not by delegation of or grant from any other power. This is also called a right in the conventional discussion of international law. It is, however, totally different thing from the interest mentioned above of a state in its territory, and yet the word "right" is applied to both without any apparent apprehension of the ambiguity involved. It appears from these instances and others referred to in the chapter that the word "right" is entirely too ambiguous for use in accurate thinking, and accordingly will be discarded, although its use by the writers will occasionally be referred to.¹⁴

A state cannot be said to be criminally guilty of a violation of the

¹² See §114, ante.

¹³ See §115, ante.

law in the sense in which that word is used in the municipal law, as describing the case where violation of the law incurs the penalty fixed by the state. The word "criminal" as applied to state action, can only be used in a moral or ethical sense which, as we have pointed out, is entirely irrelevant in international law.¹⁴

A state is responsible in so far as it is subject to the external factors determining the independent state conduct, and the writers on international law use the word generally as describing what a lawyer would call the liability of the state, that is, the fact that its conduct is so determined by the external factors. This meaning is somewhat strange to the English-speaking judge and lawyer, who use the word as referring to the personal capacity of an individual to comply with the demands of the external factors of political control. The notion of the responsibility of states is of little value and will be discarded. We may, perhaps, speak of the capacity of a state in so far as we distinguish those barbarous and uncivilized states which are not fit to participate in international life on the same terms as other states of superior civilization and wealth, and possibly also the notion of incapacity may refer to a state having a government which prevents it from such participation.¹⁵

International law originated in the mind of the thinker, who first began to speculate on the nature of state conduct and ascertain how that conduct was determined. It seems clear that the conduct and the factors determining the conduct were in existence before the speculation began. Independent states adjusted their conduct to each other more or less unconsciously from necessity and from the pressure of the various factors without doubt for many thousands of years before any legal philosopher ever drew the breath of life. It is true that in the primeval life of man intercourse between tribes was rare and usually confined to armed conflict. It is clear, however, that even here a certain semblance of order was observed in the conduct of these tribes.¹

The source of international law, if it is, as we contend, a conception, must be in the mind of the person making the conception or in some outside facts from which the conception is drawn. The general statement is that the sources of international law consist of the decisions of prize courts, treaties, state acts, customs, etc. The word "source" of course, means the origin of anything, as in the case of a stream, the place in the ground from which the stream

¹⁴ See §116, ante.

¹⁵ See §117, ante.

¹ See §119, ante.

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springs; as in the case of a thought or conception, the mind of the person who originated the thought. Here, however, we may possibly say that if the conception or thought is based upon an observation of outside facts, that then those outside facts are in a measure the source of the conception, just as we speak of the sources of history, which are the muniments and historical documents contemporary to the events of which history is written. The historical book written by the author is entirely the product of his own mind, his mental conception of the facts which existed in the past, and that mental conception of those facts is derived from a perusal of certain documents which are referred to as the source of the history. The discussion over the source of international law, however, is of very little use because no distinction turns upon it, and it has no value in the practical application of international law.³

Various kinds of international law have been distinguished. Some of the distinctions proceed upon the difference in the external factors involved determining the conduct, as international morality, international custom; others upon philosophical distinctions in the nature of international law itself, as natural, necessary, positive, which distinctions are also colored by the idea of the difference in external factors. These distinctions are of little value in theory and of no practical use whatsoever.³ The science of international law is merely a name for the formal method of studying the subject better described as the philosophy of international law.⁴

No adequate history of international law has been written in English, and such a history requires separate and extended discussion. Only such few historical references as will be necessary to explain particular points will be introduced in this discussion.⁵

Private international law is omitted, as there is some doubt whether it is a part of international law at all.⁶

Municipal law is the law enforced by any political power within its jurisdiction. International law is the law enforced by international factors apart from political power. The distinction between the two is clear and is generally accurately apprehended. It is said, however, that international law is a part of municipal law, and a considerable discussion in the books will be found on this subject as to which there is great obscurity of thought. It is perfectly obvious

³ See §120, ante.

⁴ See §123, ante.

⁵ See §121, ante.

⁶ See §124, ante.

⁶ See §122, ante.

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upon reflection that the two bodies of law are so entirely separate and distinct with respect to one of the principal factors determining the conduct in question that in no sense can it be said that international law is a part of municipal law, or vice versa. What this confusing discussion amounts to is this: the international factors operating on a state determine the conduct of that state, and the state whose conduct is so determined must in turn see that its individual members and subordinate officials comply in their conduct with that international obligation resting upon it. The state, therefore, must make its municipal law conform to the international obligation unless it desires to act contrary thereto.⁷ In many cases a state will fail or omit to make such municipal provision, and when a case comes before a court of that state, as in Great Britain and the United States of America, it will be decided that the state is in fact conforming to the international obligation, and the judges will say loosely that the international law is a part of the municipal law, by which they mean, more accurately expressed, that the presumption is that the municipal law of the state conforms to the international obligation until it appears to the contrary by express enactment of the appropriate organ of the state.⁸

Various titles have from time to time been used for the subject, the distinction between which is entirely immaterial for any purpose. The only necessity is to have a title which will be clearly understood by all as referring to the particular subject in hand. The phrase "international law" best meets this requirement, although the reference to nationality by the term "international" is inaccurate.⁹

⁷ See §125, ante.

⁸ See §126, ante.

⁹ See §127, ante.

PART II

SUBSTANTIVE INTERNATIONAL LAW

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Recognition

PRELIMINARY.

§130. Intercourse between states is a fundamental fact of international life, and arises from the necessities¹ caused by the contiguity of independent states on the same planet. This intercourse forms, as it were, the background of international relations, and is first in logical order and historical importance, as communication between states must have been the first manifestation of international life, and has therefore preceded or been contemporaneous with the evolution of the first rules of international conduct.² Intercourse is an interchange of communications of some sort, and we may distinguish the intercourse itself and the means of carrying it on. This chapter relates more particularly to the means, which is discussed under the following headings: (A) Recognition as the foundation of intercourse; (B) Kinds of intercourse; (C) Parties to the intercourse; (D) Organs of intercourse; the principal discussion being as to (C).

RECOGNITION FOUNDATION OF INTERCOURSE.

§131. The primary, and what we may call antecedent, fact in international intercourse is recognition.³ An independent state must be recognized as such by another independent state before international relations between them can be entered into. The recognition may be express or implied, from the sending of an envoy or some other act of intercourse, and may therefore precede or be simultaneous with the first act of international communication. It is difficult, however, to see how there can be any communication not based on recognition.

POWER AND OBLIGATION OF INTERCOURSE.

§132. Every independent state has full power to have intercourse with other states in the exercise of one of its obvious inherent capacities. The writers generally say that there is a right of intercourse and frequently concentrate their attention on one particular act of intercourse, to-wit, the sending of an envoy,⁴ and affirm that there

¹ Vattel, (1758) Chitty's Trans. Book IV. §55.

² For history of growth of intercourse between states, see §§342, 426, post, and Lawrence, *Int. Law*, 5 ed. (1913) 295, 296; 1 Oppenheim, *Int. L.*, 2 ed.

(1912) 437; Wilson & Tucker, *Int. L.*, (1901) 152 et seq.

³ Recognition has already been discussed—see §§82–90, ante.

⁴ See §157, post, as to sending of an envoy.

is a right of legation.⁵ The word "right" if used in this connection, must be used in the sense of power. The necessities of civilization, commerce and self-interest impel an independent state to enter into relations with other states, and the habitual conduct of independent states is to maintain such intercourse with each other. Necessity and self-interest, therefore, are the chief compulsions upon a state to have intercourse with other states.⁶

The obvious power of an independent state to refuse participation in intercourse and the fact that such refusals are so rare in the regular and continuous intercourse between independent states which has been maintained for centuries, have caused the writers great difficulty.⁷ Misled by the ambiguity of the word "right," and the failure to recognize that it is used in this connection in the sense of power, these learned men have developed differences of opinion as to whether there is a compulsion on a state to permit intercourse or maintain intercourse. Some say that the state is bound to receive, but not in all cases; others that there is no obligation; others that there is no right to maintain intercourse, or that a state may refuse to receive an envoy; that intercourse may become a right by becoming a fact: that, strictly speaking, no state is obliged to participate, but the usage and comity of nations have created a reciprocal duty; that a state may refuse intercourse, at first, but when admitted cannot suspend without offense. This variety of views indicates a hopeless difference of opinion, which proceeds from failure to apprehend the real underlying principles. None of the international factors of conduct operate to restrain the exercise of this power, which is exercised fully, not only from self-interest, but also because of the

⁵ See §153, post, as to notion of right of legation.

⁶ Hall, *Int. Law*, 6 ed. (1909) 292, says, states which live under international law are practically unable to withdraw themselves wholly from intercourse with other states. Liechtenstein is the only independent state which neither sends nor receives an ambassador. Protestant states never received permanent envoys from the Pope, even when the latter was a state; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 449. Liechtenstein, however, sent a delegate to the Paris Peace Conference of 1918-1919.

⁷ See Grotius, Belli, ac. Pacis (1625), Whewell's *Trans.* II. XVIII; Hall, *Int. Law*, 6 ed. (1909) 292 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 49 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 449 et seq.; Manning, *Int. L.*, 2 ed. Amos. (1875) 103, 104; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 39; 2 *Ibid.* 176 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 335, 336; Vattel, (1758) Chitty's *Trans. Book IV.* §57; Wheaton, *Elements*, Dana's ed. (1866) 289, 290; Woolsey, *Int. L.*, 6 ed. (1897) 24 et seq., 129; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV.

gregarious instinct which pervades state organisms because they are composed of men having that instinct. Each independent state is drawn into the vortex of international life by factors over which it has no control. The only principle of international law involved is as to the manner and means of carrying on that intercourse, and as to which the factors of international conduct operate with more force and precision than in any other department of international law.

We may sum up this discussion by saying that intercourse between independent states is purely voluntary, may be suspended and renewed at pleasure, and in practice is continuous except when interrupted by special circumstances of misunderstanding or hostile relations. Few cases have occurred, since the custom of diplomatic intercourse began, where any civilized independent state has for any long period voluntarily abstained from participation in international intercourse. No case has been noted where a state has compelled another civilized state to enter into intercourse with it. Such compulsion has been exercised against weak, barbarous states, and in such case is a plain act of aggression, no doubt inevitable in the progress of civilization throughout the world.⁸ A few instances of interruption and resumption of diplomatic relations are referred to in the note.⁹

⁸ The action of the United States of America in opening relations with Japan has been supposed by some to have been a case of compulsion against the latter country, by others as a free act on Japan's part. For discussion of the question, see 5 Moore, *Dig. of Int. L.*, (1906) 733 et seq.

⁹ Great Britain and France suspended relations with Naples on account of the inhumanity with which the kingdom was ruled. Russia issued a circular protesting against the severance of diplomatic relations; Hall, *Int. Law*, 6 ed. (1909) 285, n¹. 1903, June 11, Alexander, King of Serbia, and his wife, were murdered. Four days later, Peter Karageorgevitch was elected to the vacant throne. The British minister was withdrawn and diplomatic relations between Serbia and Great Britain were not resumed until May, 1906, after the principal regicides had

been placed on the retired list. The continental powers recalled their diplomatic agents but resumed intercourse very shortly; Hall, *Int. Law*, 6 ed. (1909) 297n². 1908, Aug. 18, Persia sent a diplomatic representative to Athens for the first time in 2399 years. 1912, Jan. 12, diplomatic relations between Peru and Chile resumed after two and a half years interruption. 1918, first Rumanian Minister to the United States presented to President. In the War of the German Aggression, 1914-1918, the following severances of diplomatic relations occurred: Austria v. Portugal, March 15, 1916; Austria v. Serbia, July 26, 1914; Austria v. United States, April 8, 1917; Belgium v. Turkey, October 30, 1914; Bolivia v. Germany, April 14, 1917; Brazil v. Germany, April 11, 1917; China v. Germany, March 14, 1917; Ecuador v. Germany, December 7, 1917; France v.

Kinds of Intercourse

§133

Kinds of Intercourse.**PRELIMINARY.**

§133. The word "intercourse" applies to almost any kind of conduct between two or more states, and extends to the means and methods of intercourse irrespective of the object. Intercourse may be peaceful or hostile, which hostility may or may not result in war.¹⁰ Where the intercourse is peaceful, it is an exchange of ideas, and where it is hostile, it is an exchange of overt acts of force. This chapter relates to the former. In medieval times, intercourse was usually hostile; fighting was the principal occupation of a gentleman, and there was little commerce or private property, and the state consisted of the prince, nobles, and the peasants or serfs. We must distinguish (A) personal intercourse between heads of the state; (B) intercourse between the independent states in their corporate capacity; (C) intercourse between members of the different states, and (D) intercourse between an independent state and members of another state.¹¹ Our attention in this chapter will be confined to (A) and (B). The history of intercourse is a history of the relations of states. It seems that originally ambassadors were not used except for the purpose of opening relations with enemies,

Austria, August 11, 1914; France v. Turkey, October 30, 1914; Germany v. Italy, May 23, 1915; Great Britain v. Turkey, October 30, 1914; Greece v. Austria, July 2, 1917; Greece v. Turkey, July 2, 1917; Guatemala v. Germany, April 27, 1917; Haiti v. Germany, June 16, 1917; Honduras v. Germany, May 17, 1917; Japan v. Austria, August 25, 1914; Liberia v. Germany, May 8, 1917; Nicaragua v. Germany, May 19, 1917; Peru v. Germany, October 5, 1917; Roumania v. Bulgaria, August 30, 1916; Russia v. Bulgaria, October 5, 1915; Russia v. Roumania, January 28, 1918; Russia v. Turkey, October 30, 1914; Turkey v. United States, April 20, 1917; United States v. Germany, February 3, 1917; Uruguay v. Germany, October 7, 1917. As to the United States of America

severing diplomatic relations with Nicaragua, see 4 American J. Int. L., Supp. 249. For protocol of Feb. 11, 1913, between Venezuela and France for the resumption of diplomatic relations, see 7 American J. Int. L., Supp. 218.

¹⁰ See Chapter 11 on War.

¹¹ A foreigner may have intercourse directly with a state, in which case he will approach the state internally and be subject to the municipal law. He cannot as a member of a foreign state have intercourse with the state externally but must approach it through the representative of his own government. See §425, post. This distinction overlooked by many writers. See confused discussion by Hershey, Int. L., (1912) 158, 276. See n 16, post.

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Kinds of Intercourse

and then with the object of effecting a truce in a war which was generally going on.¹³

PERSONAL INTERCOURSE BETWEEN MONARCHS.

§134. Until the advent of democracies and limited monarchies, the king was the state and its identity as such was merged in him. His will was law, and his subjects and the state were his to do with as he pleased for his own private profit, advantage and pleasure. Intercourse between the potentates related to their personal affairs as well as to matters of state, and while a distinction was sometimes drawn between them, the general fact of intercourse included both. Personal matters were magnified to the importance of state affairs, and little attention was paid to the welfare of the state as a whole, except so far as it coincided with the interests and ambitions of the monarch. In the middle ages potentates were rough, violent and ignorant men and treated each other with scant courtesy and consideration. They were mutually distrustful, suspicious and jealous, and had good reason to be so, each king dealing with his brother king at his peril surrounded by his army and ready for any act of treachery or violence. The advent of chivalry, the existence of feudal relations between the various princes of Europe, and intermarriages, softened their habits and brought about more sociable feelings and a considerable amount of pomp and etiquette. At this era, in times of peace there were contests over precedence among these monarchs and their ambassadors, which to modern eyes are childish. This aspect of intercourse is called by some writers "state gallantry,"¹⁴ and has been the subject of much comment. It is, however, of little importance at the present time and will be dismissed without further consideration except in so far as is necessary to refer to it historically in the discussion which follows.¹⁴

INTERCOURSE BETWEEN STATES IN THEIR CORPORATE CAPACITY.

§135. Intercourse between states in their corporate capacity, that is, between the governments as such, without reference to the personal status of the monarch or head of state, is the modern condition to

¹³ Ayala, *Law of War*, (1582) Carnegie ed. I. cIX.; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 6.

¹⁴ Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV; Woolsey, *Int. L.*, 6 ed. (1897) 121;

Zouche, *L. of Nations* (1650), Carnegie ed. Part II. IV. 1-6.

¹⁴ See §154, post, on ceremonial envoys used in such intercourse. See §147, post, as to personal negotiation between heads of state.

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which our attention will be directed, with such occasional references to the former state of affairs as may from time to time be necessary. The personal affairs of the monarch or head of state have disappeared almost entirely from international life, to the great advantage and relief of the common people.¹⁵

State Parties to Intercourse.

PRELIMINARY.

§136. The bodies whose conduct is involved have already been defined as independent states. It is necessary to refer to that subject again in connection with the question of intercourse between them, and it will be found that there is a slight difference of principle. Every independent state is bound, with due regard to its own dignity and international status, not to descend to intercourse with private individuals or with bodies not subject to international factors of conduct. It would not do for a state to have intercourse with a body subject to the political power of another state. Independent states, therefore, confine their relations to other independent states, and dependent states having that international function.¹⁶ The question of whether the state is entitled to participate in international intercourse is generally raised by a contention as to the status of their envoys, whether entitled to diplomatic immunity and consideration.¹⁷ We shall refer to (A) independent States,¹ (B) dependent States,² (C) belligerent States,³ (D) Holy See.⁴

INDEPENDENT STATES—GOVERNMENT INTACT.

§137. Intercourse between independent states is the usual fact of the international world, and is the principal subject of our dis-

¹⁵ It seems to have been clearly apprehended even in ancient times that state intercourse should not be conducted for private ends. See Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 10, where he says that an embassy should not be decreed for a private cause, but only for the interest of the states. The laws of the Twelve Tables forbade anyone to be an ambassador for his own object.

¹⁶ See 1 Halleck, *Int. L.*, 4 ed. (1908) 386, n; as to the case in Great Britain

of direct intercourse between the state and foreign individuals, that is, where petitions were presented to the Commons. He says "Foreigners resident abroad are entitled to petition the House of Lords." See n, 11, ante.

¹⁷ See §170, post, on immunity of an envoy.

¹ See §137, post

² See §140, post, on dependent states.

³ See §141, post.

⁴ See §142, post.

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• Parties to Intercourse

cussion. Where the government of such a state is intact and in full operation, there is no obstacle to full participation in international intercourse.

INDEPENDENT STATE—GOVERNMENT PARALYZED.

§138. Where the government of an independent state is paralyzed, dissolved by anarchy or internal commotion, or has been overthrown by another independent state, and the other state has not yet set up its own jurisdiction in the territory, there is no organ which can participate in international intercourse. In such cases, therefore, there cannot during the existence of such a state of affairs be any corporate international intercourse between that state and the other independent states of the world. While such circumstances have sometimes occurred,⁵ they are usually only temporary,⁶ and have no effect on the general current of international intercourse or the principles applicable thereto.⁷

INTERCOURSE WITH STATES NOT MEMBERS OF THE FAMILY OF NATIONS.

§139. A member of the family of nations⁸ may have intercourse with other states not members, and many such cases have occurred. This is a matter solely in the discretion of the state concerned, but such intercourse does not of itself confer membership in the family of nations upon the non-member states,⁹ as that can only exist by the consent of the other members of the family.

DEPENDENT STATE—INTERCOURSE WITH.

§140. An independent state can but does not usually hold intercourse with a dependent state having no power of international intercourse, without the consent of the independent state upon which the dependent state is dependent. Some dependent states may by municipal law participate to a certain extent in international life, others are

⁵ Thus, during the French Revolution, there was a time when there was no responsible body representing the state. So now (1918-1919), in Russia, the government appears to be disorganized with the same result. Other instances will readily occur to the learned reader.

⁶ Twiss, *L. of Nations, Peace*, 2 ed. (1884) 21.

⁷ See §68, ante, on continuity of a state.

⁸ See §80, ante, on membership in the family.

⁹ See §82 et seq., ante, on recognition.

entirely forbidden to have any such relations with other states, and other dependent states which may in fact participate do not avail themselves of that privilege.¹⁰ The question as to the dependency of the state is presented by the refusal of the independent state to receive its envoy or accord him the usual immunities.¹¹ A few cases of dependent states are referred to in the note.¹²

¹⁰ See §52, ante, on relations between dependent and independent states, and Manning, *Int. L.*, 2 ed. Amos (1875) 104.

¹¹ See §159, post, on refusal to receive on account of body sending.

¹² "In the ancient Republic of the Seven United Provinces, the individual States were deprived of the right of Embassy, which was lodged in the assembly of the States General. Holland and Zeeland, however, had the singular privilege of presenting to the States the Ambassadors designated for England and France;" 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 159. "The electors and princes of Germany had the privilege of sending and receiving ambassadors concerning the affairs of their own territories but not concerning those of the Empire. The Hanse Towns likewise possess this privilege either by prescription or by grant from the emperor;" 1 Halleck, *Int. L.*, 4 ed. (1908) 351; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 158. Swiss Cantons appear to have no privilege of appointing envoys; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 184; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 159, 160. In 1561, Queen Elizabeth having got possession of money remitted by the King of Spain to the Duke of Alva, refused to receive his ambassador on the ground that sovereigns only are entitled to employ ambassadors. Bynkershoek observes that the fact itself shows that she resorted to this pretense to avoid restitution; and it is to be observed that England was deeply interested in preventing the subjugation of the Low

Countries. In 1588, the English ministers in Flanders made no difficulty in negotiating with the Spanish ambassadors, whose powers were only signed by the governor of the Low Countries; 1 Halleck, *Int. L.*, 4 ed. (1908) 351, n; 1 Wildman, *Int. L.*, (1849) 85. Trumpeters sent by the Maid of Orleans to Earl of Suffolk were not accorded immunity because not sent by a sovereign; 1 Halleck, *Int. L.*, 4 ed. (1908) 351n¹. Crete and Egypt have no power of intercourse, Hospodars of Moldavia and Wallachia had, by the Peace Treaty of Kainardji of 1774 between Russia and Turkey, the power of sending chargé d'affaires of the Greek communion to represent them at Constantinople. South African Republic sent diplomatic envoys; Woolsey, *Int. L.*, 6 ed. (1897) 132. Greater or less powers of international communication have been possessed and exercised by the Viceroy of Naples, Governor of Milan, Governor General of Belgium during Spanish dominion, British Governor General of India, Spanish Governor of the Philippines, Dutch Governor of Java, and by the Dutch, French and British East India Companies; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 165, 166. Member states of the German Empire as of August 1, 1914, appear to have had power of participating in international intercourse. As to envoy sent by Bavaria, see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 133n¹. As to member states of old German Empire, see Vattel, (1758) Chitty's *Trans. Book IV. §59*; Woolsey, *Int. L.*, 6 ed. (1897) 132. United States of America—

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BELLIGERENT AND INSURGENT COMMUNITIES.

§141. Belligerent and insurgent communities are frequently under the necessity of entering into intercourse with independent states.¹³ Since, however, the international status of such states is not fully established, it is customary for them to appoint agents who have all the necessary powers of envoys and perhaps the immunities, but are not invested with representative character, and therefore not entitled to all the prerogatives of an envoy because there is no international person as yet to represent. They are not accorded diplomatic honors. Practically the same question is raised by the attempt of a deposed or abdicated monarch or usurper to participate in international intercourse. A few cases are referred to in the note.¹⁴

Articles of Confederation, Article VI. "No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state." See 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 159. Federal Constitution of 1787—Member states are not expressly prohibited from sending envoys, but no state appears to have exercised the function. It has been suggested that (a) the clause prohibiting a state from entering into a treaty, Wheaton, *Elements*, Dana's ed. (1866) 290; (b) The clause investing the Federal Government with the power of sending ambassadors, Woolsey, *Int. L.*, 6 ed. (1897) 132, are each implied restraints on state power. See 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 159. Manning, *Int. L.*, 2 ed. Amos (1875) 104, discusses under head of political qualifications of the sending State or Government. As to dependent states, see Vattel, (1758) Chitty's *Trans.* Book IV. §§58-60; 1 Wildman, *Int. L.*, (1849) 85; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 7.

¹³ See §49, ante, as to belligerency and insurgency. See §84, ante, as to recognition of same. See 1 Oppenheim,

Int. L., 2 ed. (1912) 442, 443; Vattel, (1758) Chitty's *Trans.* Book IV. §68; Wheaton, *Elements*, Dana's ed. (1866) 291.

¹⁴ France and England recognized the independence of the United Provinces by receiving their ambassadors. Charles I. recognized the independence of Portugal by receiving the ambassador of John IV. France, by a treaty of alliance and commerce, recognized the independence of the United States; 1 Wildman, *Int. L.*, (1849) 84. James II. of England, while living in exile, appointed ambassadors who were received as those of a sovereign *de jure* of some of the European states; Woolsey, *Int. L.*, 6 ed. (1897) 131. When Philip II. of Spain detained two noblemen sent from the low countries in 1556, and finally put them to death, he violated no immunity of an ambassador; Woolsey, *Int. L.*, 6 ed. (1897) 132. France rejected ambassadors of Charles II. and admitted those of Cromwell at the Congress of the Pyrenees. 1641—England received ambassador from King John IV. of Portugal which had (1640) established itself as an independent state by revolt from Spain; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 161. As to envoys appointed by regents, lunatics and minor kings, see 2

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THE HOLY SEE.

§142. The Pope, since he has lost his temporal power, is not a member of the family of nations. Before he lost that power, he was not recognized by Protestant states, but since his extinction in international life he has been dealt with on an international basis by the principal Catholic powers of the world.¹⁵

Organs of Intercourse.

PRELIMINARY.

§143. The state as a living organism participates in international intercourse by its government, and that government acts through or by means of various officers,¹⁶ who, in their official capacity, may aptly be described as the organs of the state, assimilating the idea

Phillimore, *Int. L.*, 3 ed. (1879-1888) 163-165, and envoys appointed by insurgent states, see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 168. Abdication of a crown involves loss of right to send ministers. The prince in captivity or driven from the throne does not lose at once right of sending, as a usurper does not at once acquire a similar right; Manning, *Int. L.*, 2 ed. Amos (1875) 104; Martens, G., *Law of Nations*, (1788) Cobbett's *Trans. V. I.* 4. 1567—Leslie, Bishop of Ross, claimed privileges as ambassador of the de-throned Mary Queen of Scots. See discussion 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 161-163; Woolsey, *Int. L.*, 6 ed. (1897) 145n.

¹⁵ The following table shows the powers maintaining ambassadors at the Holy See: Austria and Hungary, Spain and Portugal have ambassadors; Bavaria, Belgium, Bolivia, Brazil, Ecuador, Chile, Guatemala, Monaco, Nicaragua, Peru and San Salvador maintain ministers plenipotentiary; Germany maintains a chancellor, and Holland has no envoy at Rome but an internuncio resides at the Hague; 1 Halleck, *Int. L.*, 4 ed. (1908) 352n¹. France termin-

ated diplomatic relations in 1905. See Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 343-679, where on pp. 613-614, he furnishes a list of the dates of the important events, 1845-1871, affecting the international status of the Papacy, and discourses particularly on the circumstances arising from the loss of the temporal power in 1870, and the unification of Italy. For text of Italian statute of guarantees and Papal Encyclic thereon of May 15, 1871, see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 655-664. In some Catholic countries, as Austria, Spain and France, the usage prevailed that the sovereign should nominate the nuncio whom he received from the Pope, the reason for which probably lay in the fear of Papal interference and of unacceptableness to the native clergy; Woolsey, *Int. L.*, 6 ed. (1897) 133.

¹⁶ Twiss, *L. of Nations, Peace*, 2 ed. (1884) 333, points out that since the whole body of a state cannot confer with the whole body of another, it is necessary to appoint one or more individual members of the body to act on behalf of all.

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Organs of Intercourse

of the latter to that of an animal. The state is an organism having consciousness and volition furnished by the officials and the people who compose the state. These organs of intercourse are (A) the head of the state, (B) the home office having charge of foreign affairs, (C) diplomatic officers, and (D) consuls.¹

Some writers speak of the agents of the state in describing these officials. This, it is submitted, is inaccurate. The head of a state, or its principal officers, cannot be said to be agents of the state in any proper use of the word. An agent is a person independent of his principal, and only connected with the former by some special arrangement. The head of a state or its principal officers are part of a state, a branch of the government. They are, for the time being, occupying an official position entirely apart from their individual status, which continues as before after their term of office is ended. An envoy may perhaps more accurately be said to be an agent of the state and is sometimes in practice so described. Even here the term is not clear because he is an official and his powers and duties arise because of his official status and not because of any arrangement he may have with the state. There is no word in English which describes generally all the various classes of envoys, ambassadors, ministers, etc. It is therefore necessary in referring to them generally to use the words ambassador and envoy interchangeably.² Intercourse between heads of state was of frequent occurrence³ among autocrats, but in modern limited governments the head of the state has diminished in importance, and the foreign office and the envoy are almost exclusively employed. With the increase in facilities of communication, the position of the envoy has decreased in importance.

¹ The discussion of consuls will be omitted. For references to them see 1 Halleck, *Int. L.*, 4 ed. (1908) 396-429; Hershey, *Int. L.*, (1912) 299 et seq.; 1 Lorimer, *Inst.* (1883-4) 287-324; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 482 et seq.; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 265-336; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 378; Woolsey, *Int. L.*, 6 ed. (1897) 152 et seq.; Wilson & Tucker, *Int. L.*, (1901) 186 et seq.; Wilson, *Int. L.*, (1910) 181 et seq. "Le Consul: Functions, Immunities, Organization, Exequatur," (1909) Ellery C. Stowell. See 3 *Amer. J. Int. Law* 780.

Act of Congress of April 5, 1906, providing for reorganization of the Consular Service of the United States; 1 *American J. Int. L.*, Supp. 308. Regulations governing appointments and promotions; 1 *American J. Int. L.*, Supp. 313. List of Consular Officers as of July, 1907; 1 *American J. Int. L.*, Supp. 321. "The American Consular Service," Wilbur J. Carr; 1 *Amer. J. Int. Law*, 891.

² See Woolsey, *Int. L.*, 6 ed. (1897) 126.

³ For instances of and discussion, see §147, post.

EFFECT OF FORM OF STATE GOVERNMENT.

§144. The government of the state is its organ for international corporate relations with other independent states, and the form of the government is of some practical importance. An absolute monarch exercises all the functions of the state without limit and consequently was fully able to participate in international intercourse. In limited governments the people may reserve to themselves or distribute among various organs of the government the various powers of international intercourse with the result that such governments will be unable to act as quickly and freely as an absolute monarch. The form of the government is a matter of municipal law solely in the discretion of the members of the state, and the independent states of the world must necessarily put up with any difficulties arising out of the peculiar form of the government of any particular state. Intercourse between states in their corporate capacities is necessarily intercourse between the governments of the state.

Head of State.

PRELIMINARY DISTINCTION BETWEEN PERSONAL AND LIMITED GOVERNMENTS.

§145. The head of the state is the monarch, or, in republics, the chief executive, and acts for the state government in international as well as other matters.⁴ In limited governments his position and powers may be defined and prescribed by the municipal law, and the extent of his power in international intercourse determined thereby. In the case of a republic, the head of a state has less personal importance in international life. He is merely the chief executive officer and is addressed by monarchs as "My friend," not as "brother." The head of a state is usually clearly defined by municipal law; sometimes this is not the case, and then other states must exercise a discretion as to what the facts really are. Two heads are inconsistent from an international point of view. The absolute monarch overshadowed the state government, which was largely a personal matter. In limited governments, and particularly in republics, the head of the state is a private individual for the time being lost in the headship of the state, and appearing therein only as an official.⁵

⁴ See §86, ante, on recognition of head of state.

⁵ Hall, Int. Law 6 ed. (1909) 291, 292.

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Head of State

A head may be *de facto* and exercise functions of a head although a usurper or illegitimate.⁶

POSITION OF HEAD OF STATE IN INTERNATIONAL LIFE.

§146. The position of the head of the state in international life arises entirely from his official status as head or organ of the state, ceases when he no longer occupies that position,⁷ and is entirely disassociated from him as an individual. This was as true of autocracies as it is today of the heads of limited governments. A king who has lost his throne has no international position except by courtesy or family consideration of the several monarchs of the world. Where he is inside the jurisdiction his position is solely a matter of municipal law. Where he passes out of the jurisdiction of the state of which he is the head, and comes within the jurisdiction of another state, several questions arise, before discussing which we shall say a few words about the functions of the head.

FUNCTIONS OF HEAD OF STATE.

§147. The functions of the head of a state, whether in a republic or a monarchy, are determined by the municipal law.⁸ They generally extend to international intercourse, the negotiation of treaties,

⁶ Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 425, says that some kind of a head is necessary, according to international law, as without a head there is no state in existence but anarchy, upon which it is to be observed: (a) the state is an organism whose life is not determined by changes in government or in the head of a government; (b) a government may exist without a head and yet avoid anarchy, however unusual such a government is; (c) the head is not necessary according to international law, but almost absolutely necessary to the international activity of the state in fact, and therefore other states will be impeded in their intercourse by the absence of such a head, and confronted with a difficulty of fact, not a difficulty of law.

⁷ Heads of a state are not the subject of international law, although there is

an opinion to the contrary; 1 Oppenheim, Int. L., 2 ed. (1912) 427. See §113, ante, on subjects and objects of international law. See §112, ante, on application of international law.

⁸ Some writers call it competence; 1 Oppenheim, Int. L., 2 ed. (1912) 427. This means nothing more than his power. It is immaterial what the power in the monarch is by municipal law, and it seems error to say, as Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 429, does that international law recognizes all monarchs as equally sovereign. International law does not recognize anything. It is incapable of recognition. It is immaterial what their so-called sovereignty is, it is the states which are equal. The extent of the sovereignty of the head of the state is a matter of municipal law. See §48, ante, on sovereignty.

Head of State

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carrying on war, and they may be limited in any way by the municipal law. The head does not usually negotiate, and his direct appearance in international affairs is rare in modern times. Formerly, among autocratic governments, the monarch often acted in matters of negotiation.⁹ This was not only owing to his greater personal supremacy in affairs of state, but also to the fact that he had more time, and the government in those days was less complicated. Even modern autocrats leave more to their foreign offices than was formerly the case.

Head of State Outside the Jurisdiction.

PRELIMINARY.

§148. When the head of the state is outside the jurisdiction of the state of which he is the head and in the jurisdiction of another state, several questions arise of how far the absolute jurisdiction of the foreign state as to him is restrained by any international factors of conduct. We shall discuss monarchs and heads of republics separately, beginning with the former as first in historical order, and at the same time furnishing nearly all the precedents.¹⁰

MONARCHS OUTSIDE THE JURISDICTION.

§149. In medieval times, princes were rude and violent men, and all entries into each other's dominions were generally with hostile

⁹ Instances of personal negotiations by monarchs.—Recent congresses where potentates have met in person: Congress of Vienna, June, 1815; Congress of Aix-la-Chapelle, 1818; Congress of Troppau, 1820; Congress of Laibach, 1821; Congress of Verona, 1822; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 58, 59. See §134, ante as to personal intercourse between monarchs. When kings met it was necessary to guard against treachery. For instances of precautions against such treachery in ancient times, see Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. 4. The President of the United States of America participated personally in the

negotiations of the Peace Conference at Paris, 1918–1919. See as to President of the United States of America. "The President's Control of Foreign Relations," (1918) Edward S. Corwin. "Constitutional Power and World Affairs," (1918) George Sutherland.

¹⁰ There is no distinction in theory between the immunity of an envoy and that of the head of the state. As to the theory of the immunity of the envoy, see §170, post. The case of the head of the state has caused less discussion as it has occurred less frequently. See Resolutions of the Institute of International Law, at meeting of 1891, Carnegie Ed., 90.

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intent. Consequently one who entered on any other mission was entering as an exceptional case and generally did so under the special license and passport of the head of the state. Any other entry was assumed to be hostile, and the prince who entered must be held to have suffered the consequences of his own folly if taken prisoner. The head of a state when outside his jurisdiction, from the 11th to the 15th centuries, was in a position of great danger, and the princes at that time generally seized each other whenever possible, and exacted ransoms, oaths, etc., as the price of surrender, and frequently put each other to death.¹¹

With improvement in manners, increase in commerce, the growth of chivalry, and closer communication between the ruling families in Europe, peaceable and social intercourse became more prevalent, consequently the heads of state frequently entered each other's dominions on peaceable errands, and the distinction between a hostile and peaceable entry became more apparent. It has been suggested, therefore, that kings were supposed to enter under agreement waiving the applicability of the municipal law and giving them

¹¹ 1062—Harold, Duke of Wessex, who aspired to the crown of England, was driven by a storm into a port of the Earl of Ponthieu on the coast of Normandy. Although there was peace between the countries, the Earl seized him in order, according to the custom of the age, to make advantage of his ransom. The prisoner was demanded by the Duke of Normandy, who, before setting him free, exacted from him an oath that he would not oppose him in his own designs upon the throne. Harold subsequently declared the oath void on the plea of duress, and obtained the crown; 1 Ward, Hist., (Dublin, 1795) 161. Richard I. of England, on his return from the Holy Land, was shipwrecked in the Adriatic, and endeavoring to pass through the territories of the Duke of Austria, was arrested and afterwards sold to the Emperor Henry VI. This important case gave rise to much discussion, but it does not appear that anyone raised the question that the seizure was contrary to the inter-

national custom of the time. The only violation was of the immunity which at that time attached to the one who had assumed the Cross, the custom being that he should not be interrupted by any act of hostility from enemies at home. Richard was subsequently ransomed, and his mother, Queen Eleanor, took a voyage to Germany for the settlement of the affair; 1 Ward, Hist., (Dublin, 1795) 161, 162. Cardinal Richelieu arrested the Elector of Palatine who had ventured into France upon the strength of being at peace with that kingdom; 1 Ward, Hist., (Dublin, 1795) 164n. 1406—Robert, King of Scotland, resolved to send his son and heir, James, to France, for education and as a matter of safety. The young prince sailed along the coast of Norfolk in his vessel and, being seized with illness, ventured on shore. He was immediately arrested and conducted to Henry IV. who kept him in prison for eighteen years, at the end of which he was released on the pay-

immunity, and where they did otherwise would be under special circumstances, as entering incognito or something of the kind.¹² It will not do, however, to place the immunity upon an implied agreement. These kings formed an exclusive society of their own, and were naturally quite willing to concede privileges to each other as visitors as against the common herd.

Formerly monarchs when traveling in each other's dominions exercised extensive jurisdiction,¹³ dispensing criminal justice and the like which was necessitated by (A) the violence of the times,¹⁴ (B) the

ment of a regular ransom; 1 Ward, Hist., (Dublin, 1795) 163. 1506—The King of Castile, in the right of his wife, passing through the channel from the Low Countries to Spain, was forced by a tempest on the coast of England, where he was seized, and Henry VII. would not let him leave the kingdom until he had extorted from him the Earl of Suffolk, his rival, to whom Philip had until then afforded asylum; 1 Ward, Hist., (Dublin, 1795) 163. When monarchs met for negotiation, they generally had a barrier erected between them on a bridge over a stream and talked through it like prisoners in a cage, the respective armies being encamped on the opposite banks. See discussion of the meeting between Edward IV. of England and Louis XI. of France at Picquigny on a bridge over the Somme; 1 Ward, Hist., (Dublin, 1795) 166. Louis XI. was ashamed of having arrested Alphonso, King of Portugal, during his visit to France, and caused vessels to be equipped, wherein he was honorably conveyed to his own kingdom. Francis I., although advised by his council to seize and detain Charles V. in order to compel the performance of his promise to restore the Duchy of Milan, allowed him to pass through his territories unmolested. Charles Emanuel, Duke of Savoy, while he was fomenting faction in France, came on pretense of a visit to the court of Henry IV. for the purpose of pursuing his intrigues on the

spot. Henry IV. against the advice of his council, acting upon his own opinion, which he considered to be more in accordance with the law of nations, dismissed him with impunity. The alleged arrest of the Duke of Mecklenburg in Holland, in the year 1693, is disapproved of by Bynkershoek in point of law, and doubted in point of fact; 1 Wildman, Int. L., (1849) 43. During the Thirty Years War, the French arrested in France the Elector of Palatine on grounds of entering dominions without a safe conduct; 2 Phillimore, Int. L., 3 ed. (1879-1888) 215, 216. It was the custom that the emperors should receive sacred unction from the hands of the Popes, but it was usual, previous to the commencement of the ceremony, where they would approach so near to one another, for each of them to take an oath that he would not be guilty of assassination during its performance. This remarkable oath was duly administered to Frederick Barbarossa and Pope Adrian IV. upon the coronation of the former at Rome in 1155; 1 Ward, Hist., (Dublin, 1795) 165.

¹² See Hershey, Int. L., (1912) 295 et seq.; 2 Phillimore, Int. L., 3 ed. (1879-1888) 136, 574 et seq; Vattel, (1758) Chitty's Trans. Book IV. §108.

¹³ Vattel, (1758) Chitty's Trans. Book IV. §108.

¹⁴ Engelram de Nogent was taken in a house at Paris where Edward I. was residing, and France consenting, tried,

impudence and arrogance of the monarch's suite, the members of which, feeling themselves elevated above the common run of mortals by close contact with royalty, would demean themselves accordingly and thus occasion disputes with the natives. Improvement in manners and strength of government and advance in civilization rendered the exercise of the jurisdiction unnecessary and distasteful to the foreign governments, and it is accordingly obsolete. The international factors of conduct have operated to remove the restraints on the power of the state in which the foreign monarch is, and the operation of which restraints allowed the traveling monarch the free exercise of his jurisdiction.

The monarch was not liable to be sued in his own courts without his consent, and the universal practice was for each state to apply in its municipal court the same rule respecting suits against foreign potentates. The same principle applies in modern times. A republic cannot be sued without its consent either in its own courts or in the courts of another state.¹⁵ When the prince held property

convicted in hotel of the English king, and hung on charge of thievery. Did not appear where the crime was committed; Walker, *Man. Int. L.*, (1895) 70. Richard I. of England, on his way to the crusades, hung robbers on gibbets which he erected outside his camp at Messina, doing equal justice to the stranger and the native; Walker, *Man. Int. L.*, (1895) 69; Walker, *Science, Int. L.*, (1893) 222. 1655—Charles II. when in exile in Germany caused a number of his suite to be executed on the charge of treason; Walker, *Man. Int. L.*, (1895) 70. 1656, Nov. 10—Christina, abdicated queen of Sweden, when in France sentenced her grand equerry (an Italian) to death, and had him executed by her body guard; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 431n¹; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 149, 150; Walker, *Man. Int. L.*, (1895) 70. Edward I., on passing through France from the Holy Land, assumed jurisdiction over, tried and condemned to death one of his train for embezzlement, France evidently consenting;

1 Halleck, *Int. L.*, 4 ed. (1908) 158, 159. 1873—Shah of Persia, while in London, condemned a member of his suite to death. Great Britain refused to permit the execution.

¹⁵ Mary Queen of Scots, at the time of her execution, had been for twenty years dispossessed of her crown and her son acknowledged as king by all Europe. She was styled in the indictment "Mary, daughter and heir of James V., late King of Scots, otherwise called Mary Queen of Scots, Dowager of France;" 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 150; 2 Ward, *Hist.*, (Dublin, 1795) 339. For the case of the King of Prussia cited into Dutch court as a defendant in the matter of the succession to the principality of Orange, see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 141, 142. 1837—The Duke of Cumberland became King of Hanover, but at the same time he was, by hereditary title, an English peer and therefore an English subject. And in 1844, in the case of the Duke of Brunswick v. King of Hanover, the Master of the Rolls held

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in another jurisdiction, the title was necessarily subject to the municipal law,¹⁶ and no distinction appears to have been drawn because of the royal ownership except in some instances of exemptions from customs and other dues. The monarch might waive his immunity by traveling incognito or accepting service in the army of the foreign government.¹

that the King of Hanover was liable to be sued in the courts of England in respect of any acts done by him as an English subject; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 433. 1870-72—The French courts permitted, because she was deposed, a civil action against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 432. "Sovereigns as Defendants," Nathan Wolfman; 4 *Amer. J. Int. Law*, 373.

¹⁶ Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. V. 9, says that movables of the sovereign are generally exempt from customs; immovable property not usually exempt from imposts and his private property in the jurisdiction is under the jurisdiction of the state just as the private property of an individual, and so a dispute between two sovereigns relative to such property will be terminated by the municipal courts. Spanish vessels seized in Flushing for a debt due from the King of Spain is the only instance of an attempt made by an individual to assert a claim against a foreign prince by seizing his ships of war; 1 Wildman, *Int. L.*, (1849) 45. See §321, post, as to immunity of ships of war in the maritime belt. The private property of the prince in a foreign country assumes the character of private individual property and is not privileged, being subject to the same jurisdiction as individuals; 1 Wildman, *Int. L.*, (1849) 44. Distinction has been drawn between real and personal property,

Hershey, *Int. L.*, (1912) 295, and characterized as immaterial; Hall, *Int. Law*, 6 ed. (1909) 170n¹. "Actions against the property of sovereigns;" Charles H. Weston. 32 *Harv. Law Rev.* 266-277.

¹ Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. V. 8, says the head of a state violates immunity outside the jurisdiction when (1) he comes in secret; (2) unless he is in possession of a real sovereignty or the right of claiming it; (3) if he is subject to the state, as, for instance, in the military service; (4) if he commits a crime which militates against the safety of the state, in which case he may be required to depart or in general to be acted against, as an enemy of the state. Wheaton, *Elements*, Dana's ed. (1866) 155, says that the entry of a foreign sovereign in another state, with the knowledge and license of the head of that state, although without express stipulation exempting from arrest, was universally understood to imply such stipulation. 1873—King William of Holland, traveling incognito in Switzerland, was fined, but on his giving up his incognito, the sentence was not carried out; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 432. "A legal heresy—exemption of sovereign from suit." In criticism of language of Mr. Justice Holmes in *Kawananokoa v. Polyblank*, 205 U. S. 349. 13 *Ill. L. Rev.* 431-462. "Rights and immunities of a sovereign ruler." Fred H. Peterson, 88 *Cent. L. J.* 28-31.

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Envoys

HEAD OF A LIMITED GOVERNMENT OUTSIDE OF JURISDICTION.

§150. When the limited government is monarchical in form, the king generally is considered to retain in international life his former personal status, entirely apart from the limitation on his power which may exist by municipal law. The chief executive of a republic when traveling outside the jurisdiction is practically in the same position as a monarch, and is usually accorded the same courtesies and privileges.² Few cases have arisen in practice, and since the executive does not have the personal importance of a king, he carries with him only the immunity of a head of a state which is to be extended no further than occasion demands.³ The reason why few cases have arisen as to the head of a republic is because the executive rarely goes out of the jurisdiction.

FOREIGN OFFICES.

§151. The usual course of business is for the negotiations to be conducted through an officer of state, described as the "Foreign Office," "Secretary of State," "Minister of Foreign Affairs," and so on. This officer is the one having charge of foreign negotiations, and the international relations of the state in general.⁴

Envoys.

PRELIMINARY.

§152. Intercourse by envoys is the general practice, and the rules relating to the position of the envoy are of great importance.

² There is an idea obtaining in some republics that the president cannot travel out of the country. This is, of course, a mere notion, unless he is restrained by municipal law, but nevertheless is largely entertained by the less instructed portion of the community.

³ See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 433 et seq.

⁴ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 435 et seq. (1849) Great Britain promulgated rule that foreign ambassador should address the government through the foreign office; 1 Halleck, *Int. L.*, 4 ed. (1908) 386n¹. See §425n², post. United States of America: As to

negotiations, see 5 Moore, *Dig. of Int. L.*, (1906) 179-184. As to Secretary of State, see 4 Moore, *Dig. of Int. L.*, (1906) 636. As to Department of State, see 4 Moore, *Dig. of Int. L.*, (1906) 780. *Diplomatic practice of, Wilson & Tucker, Int. L.*, (1901) 183. "History of the Department of State," Gaillard Hunt; *American J. Int. L.*, Vol. 1, 867; Vol. 2, 591; Vol. 3, 137, 909; Vol. 4, 384, 596; Vol. 5, 118, 414; 987; Vol. 6, 119, 679. "How China Administers her Foreign Affairs," Weiching W. Yen.; 3 *Amer. J. Int. Law* 537.

An envoy is an officer sent by an independent state into the territory of another state on public matters, and the circumstance that the envoy goes into a foreign jurisdiction gives rise to a number of important principles to which we shall next turn our attention. First, however, we shall say a few words about the various classes and ranks of envoys, and examine briefly the notion of right of legation so often alluded to by the writers.

NOTION OF RIGHT OF LEGATION.

§153. The question is often discussed whether a state has a right of legation, which when examined will be found to be a mere notion entirely inapplicable to modern international life.^{4*} Since intercourse is carried on principally by envoys, and at least all states participating in international life send and receive envoys to and from the state with which they have relations, it follows that the sending and receiving of an envoy is the preliminary fact in international intercourse, and the question of whether relations are to exist is made in the first place to turn on the sending and reception of an envoy.⁵ Furthermore, the phrase even if stretched to describe the entire intercourse between independent states, is open to criticism because of the obscurity of the word "right."⁶ It is perfectly practicable now for any two states to dispense with envoys and communicate entirely by telegraph from the home office, and therefore no question arises as to any right of legation. The phrase "right of legation," therefore, while only applying to the sending of an envoy, has in the hands of many writers still retained the medieval idea of summing up the intercourse between states, of which it is now only one means.⁷

^{4*} As to right of legation, see Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II, XVIII; 1 Halleck, *Int. L.*, 4 ed. (1908) 288 et seq.; Hershey, *Int. L.*, (1912) 276; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 440; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 333 et seq.; Wheaton *Elements*, Dana's ed. (1866) 289.

⁵ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 441 et seq. "Right of legation is the right of a State to send and receive

diplomatic envoys." The right to send active, the right to receive passive; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 440.

⁶ See §115, ante, as to obscurity of the use of the word "right" in international relations.

⁷ See §140, ante, on dependent states, and §141, ante, on belligerent and insurgent communities; and §159, post, on the reception of an envoy as determined by state sending.

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Kinds of Envoys

KINDS OF ENVOYS.

§154. Envoys are divided into several classes⁹ as follows: (A) ceremonial,⁹ (B) political,¹⁰ (C) special,^{10*} (D) permanent, (E) ordinary and extraordinary.¹¹ All of these classes are sufficiently referred to in the notes except permanent envoys, who deserve more extended notice. Permanent envoys are those continually maintained for such business as may arise from time to time requiring attention. They were at first regarded with suspicion and supposed to be spies because they did not return home after the business was transacted, according to the practice then prevailing among ambassadors. Permanent envoys were not used until the thirteenth century. They

⁹ Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. II. 2, distinguishes religious, ceremonial, watching and necessary embassies, which distinctions are now obsolete.

⁹ Ceremonial envoys are sent only on occasions of ceremony, as weddings, funerals, and were exclusively employed among monarchs who constituted an exclusive society among themselves, to which individuals were not admitted on equal terms. The sending of such envoys was a matter of social usage which acquired international importance because of the personality of the monarch overshadowing the state. The occasions for sending such envoys have decreased with the rise of democracy as the people justly object to being saddled with the expense of these missions on account of the personal affairs of one individual. In the language of the modern democrat, such a mission is a junket. See §134, ante, on personal intercourse between monarchs, and Woolsey, *Int. L.*, 6 ed. (1897) 126; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. II. 2.

¹⁰ Political envoys are those sent on matters of state business and are the ones in common use today. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 443, distinguishes political envoys into two classes: (1) those permanently or temporarily accredited to a state for

negotiating with such State; (2) those sent to a congress or conference who are not or need not be accredited to the state on whose territory the congress takes place.

^{10*} Special envoys are sent only for a particular occasion, and the duration of their mission is brief, usually terminating at the completion of the business on which they are sent.

¹¹ Extraordinary embassies—those which are found necessary according as affairs and business of state require them; and upon them civil conventions, treaties and the like are discussed; Zouche, *L. of Nations* (1650), Carnegie ed. Part I. IV. II. 2. Envoys to congresses have the same status as others and are not necessarily accredited to any state, even to the state on whose territory the congress meets. No case appears to have arisen as to the immunity of such an envoy. Agents for private affairs of princes and such as have only title of resident or counsellor of legation or agent are not members of the diplomatic body; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 352. As to Papal envoys, see Woolsey, *Int. L.*, 6 ed. (1897) 150n¹. "A military embassy is one which is employed to treat of things pertaining to war;" Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 2.

Ranks of Envoys

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did not become general until the second half of the seventeenth century.¹³ The former practice was to send special envoys for particular occasions and not to maintain representatives at the capital of the foreign state. The general increase in international intercourse and in the amount of business to be transacted have made it necessary in practice for an independent state to be represented by permanent envoys.

RANKS OF ENVOYS.

§155. There were no ranks of envoys¹³ in the middle ages, and a number of attempts were made to settle the different rank and precedence of various diplomatic officers. Precedence was claimed by each envoy according to the relative rank of his royal master, and Europe constantly rang with the accounts of the unseemly squabbles between the various envoys at some capital.¹⁴ By the Congress of Vienna of March 19, 1815,¹⁵ and the protocol of the Treaty of Aix-la-

¹³ Permanent envoys began after the peace of Westphalia in 1648; Woolsey, *Int. L.*, 6 ed. (1897) 128. For a sketch of the beginning of permanent missions, see 2 Ward, *Hist.*, (Dublin, 1795) 286 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 127-129. Venice appears to have been the first state in Europe to send permanent envoys; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 350, 351; Vattel, (1758) Chitty's Trans. Book IV. §66. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 183, says that the continuous residence of an envoy is, strictly speaking, a matter of comity and not of strict right, and that after the custom of permanent embassies became established, many objections were made to permanent envoys. "Ordinary or perpetual embassies, which may also be called watching, are those which have no precise or definite business as their object; but are undertaken for a period of time," and bear some likeness to those sent with proconsuls into provinces and with generals, into foreign countries; Zouche, *L. of Nations* (1650),

Carnegie ed., Part I. IV. II. 2. The distinction between ordinary and extraordinary is based on whether the appointment is for an indefinite period or for some particular occasion; 1 Halleck, *Int. L.*, 4 ed. (1908) 51: or, according to some authors, whether for ordinary business or extraordinary business; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 249.

¹⁴ Called classes of envoys by 1 Oppenheim, *Int. L.*, 2 ed. (1912) 443.

¹⁵ For a discussion of these contests, see 1 Halleck, *Int. L.*, 4 ed. (1908) 29 et seq.; Walker, *Science*, *Int. L.*, (1893) 120; 2 Ward, *Hist.*, (Dublin, 1795) 227 et seq. There was a long dispute between the ambassadors of France and Spain. The place of France until the 16th century, according to the ceremonial of the Holy See, had been next to that of the German Empire, but as Charles V. was both emperor and king of Spain, his successor on the Spanish throne claimed precedence of other kings; Woolsey, *Int. L.*, 6 ed. (1897) 60.

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Ranks of Envoys

Chapelle of November 21, 1818,¹⁵ certain ranks were established which have been observed ever since except by the Ottoman Porte, which maintains a system of its own. The various ranks so established are referred to in the note.¹⁶ This classification is based on

¹⁵ For translation of its provisions, see Wilson & Tucker, *Int. L.*, (1901) 156-157; Woolsey, *Int. L.*, 6 ed. (1897) 149, 150. For French text, see Wheaton, *Elements*, Dana's ed. (1866) 293.

¹⁶ (a) Ambassadors, when sent by the Holy See, are called legates (*legati a latere* or *del latere*) or nuncios. Only states with royal honors are entitled to send and receive ambassadors who are the personal representatives of the heads of their states. They have the privilege of direct personal negotiation with the head of the state to which they are sent and entitled to public audience on arrival. Nuncios (not cardinals) represent the Pope in the conduct of his affairs of all sorts. Legates who are cardinals exercise in the Pope's name, in Roman Catholic countries, the spiritual functions which depend on his recognition as head of the Church; Manning, *Int. L.*, 2 ed. Amos. (1875) 106; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 444; 2 Phillimore, *Int. L.* 3 ed. (1879-1888) 249; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 345 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 150. (b) Envoys, ministers plenipotentiary and envoys extraordinary, when sent by the Holy See, are called Papal Internuncios. These are not the personal representatives of the head of their state, have no personal access and not all the special honors of ambassadors; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 445; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 249; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 348 et seq. The Austrian minister at Constantinople seems by custom exclusively designated as internuncius; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 249, and took pre-

cedence of all ministers of the second order. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 348n³¹. (c) Ministers, residents, ministers chargés d'affaires. This grade was created by the Congress of Aix-la-Chapelle. They rank below (b), they have fewer honors and no practical difference except that they do not enjoy the title "Excellency;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 445; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 250; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 349. Sometimes said to represent the affairs and not the person of their sovereign and therefore of inferior dignity. (d) Diplomats credited to ministers for foreign affairs. These officers are accredited from one foreign office to another, and have audience with foreign ministers only. *Ad hoc* are those originally sent and accredited by their government to that country. *Ad interim* are those who are substituted in place of the minister during his absence; 1 Halleck, *Int. L.*, 4 ed. (1908) 353; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 445; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 250. (e) As to the different orders of ministers before the Congress of Vienna, see Lawrence, *Int. Law*, 5 ed. (1913) 297; Martens, *G., Law of Nations*, (1788) Cobbett's Trans. V. II. 1-5; Vattel, (1758) Chitty's Trans. Book II. §§69-74. For a discussion of the history of titles and ranks of envoys, see Twiss, *L. of Nations, Peace*, 2 ed. (1884) 339-343. (f) For grade of United States diplomatic officers, see 4 Moore, *Dig. of Int. L.*, (1906) 430, 431. See list of diplomatic officers as of January 1, 1907; 1 American J. Int. L., Supp. 86.

the power and authority of the envoy,¹ and the sending state exercises its own discretion as to the grade to which an envoy is to be appointed,² and the number of the ambassadors.³

By the Fourth Article of the Congress of Vienna, the rank of diplomatic envoys among themselves was determined by the date of official notification of their arrival at the court to which they are accredited, and, by Sixth Article,⁴ all distinctions of rank between diplomatic ministers arising out of ties and consanguinity and domestic or political relations of their respective courts are abolished. Agents sent without diplomatic rank, as commissioners to settle boundary claims, are not in the same class as envoys we have been discussing. These agents have no immunity unless accredited, that is, made capable of being a medium of communication between the states.

DIPLOMATIC CORPS.

§156. The various foreign envoys at any capital form what is called the diplomatic corps.⁵ The dean of this corps, or the doyen, is always the Papal Nuncio, where there is a representative of the Holy See, and where there is none he is the oldest ambassador in service. Diplomatic corps has no particular legal significance.

¹ 1 Halleck, *Int. L.*, 4 ed. (1908) 350, Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 250-251, and Twiss, *L. of Nations, Peace*, 2 ed. (1884) 344, point out that the distinctions made by the Congress of Vienna are illogical [which is usually the case with documents drawn up by men of affairs], and that the distinction is between agents accredited to the head of the state and those accredited to the minister of state for foreign affairs.

² A difficult question arises sometimes when a new country has arisen by revolt, as to whether it shall be the first to send an envoy or whether an old country shall be the first. That is, it is really a controversy of etiquette over the opening of diplomatic relations with a successful insurgent state;

4 Moore, *Dig. of Int. L.*, (1906) 458, 459. Some controversy of this kind arose over the entrance of the United States of America into the circle of the family of nations. The older states have a natural snobbishness and are disinclined to admit new members, which makes the beginning of the diplomatic relations somewhat difficult. Such cases, however, adjust themselves in the course of time and require no special attention; 4 Moore, *Dig. of Int. L.*, (1906) 458, 459.

³ Zouche, *L. of Nations* (1650), Carnégie ed., Part I. II. II. 3.

⁴ 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 252.

⁵ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 446.

§157

Sending of Envoy

SENDING OF THE ENVOY: CREDENTIALS.

§157. The sending of the envoy involves his appointment, which is vested in the organ of government prescribed by the municipal law,⁶ and furnishing him with the necessary credentials.⁷ An independent state may send an envoy to several states or several envoys to the same state, and it is customary for the sending state to inquire in advance of the appointment of the receiving state whether the person in view will be acceptable.⁸

⁶ In the case of personal governments the monarch has the sole power of appointment. In the United States of America the Articles of Confederation provided: "Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power * * * of sending and receiving ambassadors." The Federal Constitution of 1787, Article II, Sec. 2, provides: "He (the President) shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls." "During minorities and interregnums, the appointment of public ministers is vested in those by whom the powers of sovereignty are exercised. During the vacancy of the see of Rome, the power is vested in the conclave. During the captivity of King John and King Francis I., ambassadors were appointed by the Dauphin and Queen-mother as regents. Grotius was appointed ambassador to France by Chancellor Oxenstiern in the character of regent, after the death of Gustavus Adolphus, by whom the great scholar had been designated to that office;" 1 Wildman, *Int. L.*, (1849) 85.

⁷ The envoy takes with him the following documents: (1) Letter of credence. This is a letter describing the ambassador, etc., and addressed by head of state to head of state. (2) Full

powers. This document describes the powers that the ambassador has from his own state. (3) Instructions. These are the instructions to the ambassador as to what to do in the transaction of his business, and they are of two kinds: public, which are handed to the head of the foreign state; secret, which are known only to the ambassador and his home state. (4) Special passports. These are the particular passports to the ambassador and the members of his suite; Hall, *Int. Law*, 6 ed. (1909) 295 et seq.; Hershey, *Int. L.*, (1912) 278 et seq.; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 259; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 353-363; Vattel, (1758) Chitty's *Trans. Book IV.* §76; Wilson, *Int. L.*, (1910) 167; Wilson & Tucker, *Int. L.*, (1901) 162 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. II. 4.

⁸ This custom called *l'agregation*. See Hershey, *Int. L.*, (1912) 277; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 337. United States of America apparently does not require other powers to ask in advance if certain persons will be acceptable, and the custom was not followed by it but now, since it began to appoint ambassadors, inquires as to the acceptability of its representatives of that grade; 4 Moore, *Dig. of Int. L.*, (1906) 474-482.

Reception of Envoy

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Reception of Envoy.**PRELIMINARY.**

§158. The envoy must be received as such by the state to which he is sent before he can assume his official duties,⁹ and the act of reception is a state act¹⁰ performed by a monarch in personal governments, and by the organs designated by municipal law in limited governments.¹¹ An envoy has no status as such between time of appointment and that of his official reception, and the only question which arises during that period is as to his immunity.¹² Several headings present themselves under which the discussion will be arranged: (A) The determination of whether the envoy will be received as affected by the body sending him. (B) Political circumstances unconnected with person of envoy. (C) Membership in the receiving state. (D) Personality of envoy. (E) Manner of reception.¹³ An envoy will be refused reception if his papers are not in proper form or the authority therein conferred is not sufficient. Cases of this kind are rare, present no special difficulty and require no further comment.

**DETERMINATION OF WHETHER ENVOY WILL BE RECEIVED AS
AFFECTED BY BODY SENDING ENVOY.**

§159. An independent state may refuse to receive an envoy because the body sending is not an international person entitled to participation in international life,¹⁴ as where the body is a belliger-

⁹ An absolute refusal to receive is sometimes a refusal to have intercourse, and discussed, ante, §132. See Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 13.

¹⁰ See §72, et seq., ante, on act of state.

¹¹ In the United States of America the Articles of Confederation provided: Art. IX. "The United States in Congress assembled shall have the sole and exclusive right and power of * * * sending and receiving ambassadors." The Federal Constitution of 1787 provides "Sec. 3. "He (the President) shall

receive ambassadors and other public ministers."

¹² See §170, post, on immunity of envoy. See §193, post, on time from which immunity begins.

¹³ Determination of whether envoy will be received as affected by:

| | |
|---|------|
| Body sending | §159 |
| Political circumstances | §160 |
| Membership in receiving state | §161 |
| Personality of envoy | §162 |
| Manner of reception | §163 |

¹⁴ See §136-142, ante, on parties to intercourse.

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Reception of Envoy

ent or insurgent community, not a member of the family of nations or a dependent state.¹⁵

POLITICAL CIRCUMSTANCES AFFECTING RECEPTION OF ENVOY.

§160. A state may also refuse to receive an envoy from another international person because of extraneous political circumstances which make it inadvisable to receive an envoy at that particular time. A few of these cases are referred to in the note.¹

¹⁵ France received Lockhart as Cromwell's ambassador, and refused to receive the ambassador of Charles II. at the congress of the Pyrenees. The Porte dismissed the ambassador of Charles I. on receiving the ambassador of Parliament. The ambassadors of the titular kings of Denmark, Hungary and Navarre were received at many courts; 1 Wildman, *Int. L.*, (1849) 83. Louis of Bavaria imprisoned the messengers of the Pisans who refused to admit him into their town. Philip II. of Spain put to death the deputies of the Low Countries. The King of Spain yielded to the remonstrances of one of the factions that divided the city of Genoa, and refused to receive the ambassadors of the other. 1643—The States General refused to receive the ambassador of the Irish Catholics who had rebelled against the Parliament; 1 Wildman, *Int. L.*, (1849) 56, 57. See Ayala, *Law of War*, (1582) Carnegie ed., I. IX. 4. 5. 6; Vattel, (1758) Chitty's Trans. Book IV. §68. The Irish envoys were not admitted at the Peace Conference of Paris, 1918–1919.

¹ Pope Paul IV. refused to receive the ambassadors of the Emperor Ferdinand because the Roman See disputed the validity of the latter's election. Pope Clement VIII. refused to receive the ambassador of Henry IV. before the latter was reconciled with the Church of Rome. The Protestant princes of Germany and the King of Denmark refused to receive the nuncio of Pope

Pius IV. because they did not acknowledge the spiritual supremacy of the Pope, who, in his credentials had designated them as his sons. Charles II. refused to receive the ambassadors of Dom Pedro until he should be satisfied that Dom Pedro was in lawful possession of royal authority either as king or regent of Portugal. Charles Gustavus, King of Sweden, having learned that the Elector of Brandenburg had formed an alliance with the King of Poland in the hope of obtaining the sovereignty of Prussia, refused to receive his ambassador, alleging that a sovereign is not bound to receive the ambassadors of his enemies. For a like reason the Elector Palatine refused to receive the ambassador of Archduke Albert. The King of Castile refused to receive the ambassador of the King of Arragon whom he believed to be preparing to make war upon him; 1 Wildman, *Int. L.*, (1849) 84, 85. Ferdinand the Catholic having refused to ratify the treaty of Blois, on the false pretense that Philip of Austria had exceeded his powers in executing it, Louis XII. received Ferdinand's ambassadors only to reproach them with his treachery, to refuse all intercourse with their master until he should have ratified the treaty, and to order them to quit the kingdom the same day; 1 Wildman, *Int. L.*, (1849) 84. The United Provinces, during their struggle for independence, refused to receive an envoy from friendly German powers

ENVOY A MEMBER OF RECEIVING STATE.

§161. It was frequently the practice in the past for envoys to be sent who were members² of the receiving state. Many states have refused to receive their own members as ambassadors, and the question seems to lie entirely in the discretion of the state concerned, and it is perhaps more accurately discussed under the heading of personality of an envoy. A few instances are collected in the note.³ The practice of receiving an envoy who is a member of the state seems to be entirely disappearing.

because they brought proposals of peace incompatible with their honor. Elizabeth of England rejected the nuncio of Pius IV. sent to invite her to appoint deputies for the Council of Trent, because his mission might have the ulterior object of stirring up dissatisfaction among the English; Woolsey, *Int. L.*, 6 ed. (1897) 130. 1792, Dec. 31—Great Britain dismissed French ambassadors on account of the French Revolution, declining to hold any official communication with France except through its King; 1 Halleck, *Int. L.*, 4 ed. (1908) 388n¹. See letter of dismissal, 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 883. 1796—France refused to receive a minister plenipotentiary from the United States until after the redress of grievances of France against the American government. The French government subsequently refused to formally receive the United States Minister although continuing to negotiate with him in an informal manner; 4 Moore, *Dig. of Int. L.*, (1906) 476. During the contest over the Spanish monarchy growing out of the Napoleonic wars, the United States of America, in order to preserve an attitude of non-interference, declined to send or receive a minister from either of the contestants; 4 Moore, *Dig. of Int. L.*, (1906) 477. See 1 Halleck, *Int. L.*, 4 ed. (1908) 388n¹.

² See §430 et seq., post, as to who is a member of the state.

³ The old German Confederation refused upon substantial ground to receive any Frankfort burger as a representative of any member of the Confederation except Frankfort. France under the old regime and the First Empire, and the United Provinces from 1727 refused to receive members as envoys from foreign states; Woolsey, *Int. L.*, 6 ed. (1897) 132, 133. France sent Rossi, an Italian naturalized in France as ambassador to Rome; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 179, 180n. For instances of Frenchmen received by France, see Twiss, *L. of Nations, Peace*, 2 ed. (1884) 337. Louis XIV. received his own quondam subjects, the two fiddlers, as ambassadors. Dr. Story, an Englishman, was sent to Great Britain as a minister of Spain. 1636—A Dutchman convicted by the Dutch East India Company, fled from India to England, and was sent by the latter country as a diplomatic agent to Holland, where he was arrested by the Dutch Government at the instance of the company, but liberated as the States General wanted to stand on good terms with Great Britain; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 181, 182. 1871—The Ambassador of Austria in England had been a subject of the King of Saxony, and at one time prime minister of that country; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 182, n^r. 1875—The Pope refused to receive Prince Hohenlohe as

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Reception of Envoy

PERSONALITY OF ENVOY: PERSONA GRATA.

§162. An independent state will not ordinarily receive as envoy from another state an individual personally disagreeable to it. The delicate nature of the duties conferred upon the envoy, and the close personal and social association with the head of state and with the other ambassadors, imperatively require that the envoy should be of such a character, temperament and training that he will be able to conduct himself without giving offense in the country to which he is sent.⁴ Cases, therefore, have frequently occurred where powers have objected to a certain envoy on personal grounds, and it is the universal practice among independent states to recognize that each state may make such objection, and upon so doing the other state will appoint someone else. Two cases may arise: The objection may be made before the reception on personal grounds, or

ambassador from Germany because, being a cardinal, he was ex-officio a member of the Curia; Hall, *Int. Law*, 6 ed. (1909) 292. 1891—The Persian ambassador in London appointed a British subject as honorary attaché of the embassy, which appointment was in no way recognized by the British Government. In 1891 a judgment was obtained against the Briton, and he claimed immunity from all civil processes as a member of the Persian Embassy. It was held that he was not entitled to the privilege claimed as his appointment was inadvertently made by the Persian ambassador and obtained for the purpose of protecting him against his creditors. *Ex parte Cleote*, 65 *Law Times*, 102; (1891) Moore, Vol. 4, 651–52. The case of *Wicquefort*, put by Woolsey, *Int. L.*, 6 ed. (1897) 136, is stronger, as the envoy was not only a member but an official of the receiving state. 1793, *Citizen Genet* was recalled by France at the request of the United States of America, and *M. Cataczy* was recalled later. *Mr. Burlingame*, a citizen of the United States of America, was received not as ambassador but as

special agent from China; Woolsey, *Int. L.*, 6 ed. (1897) 130n¹. 1886—United States Government refused to receive a citizen of the United States as charge' d'affaires of the Hondurian Government in the United States on the ground that the immunities and privileges of a foreign minister made it inconvenient for a citizen of the country to enjoy so anomalous a position. A suit was subsequently brought against this individual in New York, and the Department of State declined to certify that he was at the time suit was brought invested with a diplomatic character; 4 Moore, *Dig. of Int. L.*, (1906) 650–651. The United States has received an unnaturalized citizen as secretary of a foreign legation and refused to receive an unnaturalized citizen as charge' d'affaires; 4 Moore, *Dig. of Int. L.*, (1906) 550. See 4 Moore, *Dig. of Int. L.*, (1906) 549 et seq.; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 179–180; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 337, 338; Vattel, (1758) *Chitty's Trans. Book IV. §112*; Woolsey, *Int. L.*, 6 ed. (1897) 130–132.

⁴See Ayala, *Law of War*, (1582) Carnegie ed., I. IX. 7.

Prerogatives of Envoy

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and if the occasion requires it the objection may be expressed more forcibly.⁹

MANNER OF RECEPTION.

§163. The manner of reception is, within the limits imposed by the immunity of the ambassador, entirely within the discretion of the receiving state, which may, if it sees fit, hold the envoy on the border and require him to conduct the negotiations from that point.¹⁰ If he is received, his route of travel from the frontier may be prescribed, and his immunities forfeited if he deviates.¹¹ In practice in modern times no such restrictions are imposed on an ambassador, and most states observe the same rules of etiquette as to his reception which formerly called for much pomp and ceremony¹² but is now reduced to the simplest form consistent with the importance of the parties involved. The details need not detain us here as they are of no legal importance.

PREROGATIVES OF AN AMBASSADOR.

§164. The prerogatives of an ambassador are personal privileges, most of them a survival of former customs, but some of which are still of practical importance. The prerogatives attach to the office of the envoy as marks of his position as a personal representative of his sovereign, and his consequent position of equality with the monarch to whom he is sent.¹³

⁹ See note of Secretary of State to German Ambassador dated Dec. 10, 1915, in Amer. J. Int. Law, special supplement Vol. 10, 364, where he speaks of the two attachés whose recall has been requested, as no longer *persona grata* to the United States.

¹⁰ Twiss, L. of Nations, Peace, 2 ed. (1884) 336; Vattel, (1758) Chitty's Trans. Book IV. §65.

¹¹ 1 Halleck, Int. L., 4 ed. (1908) 390.

¹² It was the custom in the 16th and 17th centuries for ambassadors to make a public entry upon their first arrival at a capital. For account of the entry of Grotius as ambassador from Sweden to the court of France into Paris, see Grotius, by Vreeland (1917), 194. See Lawrence, Int. Law, 5 ed. (1913) 299, 308, Martens, G., Law of Nations, (1788) Cobbett's Trans. V. IV.; 4 Moore, Dig. of Int.

L., (1906) 465 et seq.; 2 Phillimore, Int. L., 3 ed. (1879-1888) 259 et seq.; Twiss, L. of Nations, Peace, 2 ed. (1884) 363-365; Wilson & Tucker, Int. L., (1901) 165; Zouche, L. of Nations (1650), Carnegie ed., Part I. IV.

¹³ Prerogatives appertaining to office of ambassador are:

- (1) Title of Excellency.
 - (2) Privilege of remaining covered in presence of sovereign unless sovereign himself is uncovered.
 - (3) Privilege of a dais in his own home.
 - (4) Coach and six outriders.
 - (5) Military and naval honors.
 - (6) Use of coat of arms over door.
 - (7) Invitations to all court ceremonies.
- See Wilson & Tucker, Int. L., (1901) 169, 170; Vattel, (1758) Chitty's Trans. Book IV. §78, and cases cited.

§§165, 166

Immunity of Envoy

Immunity of an Envoy.

PRELIMINARY

§165. The immunity of an envoy is well settled in international relations. The principal questions are as to the extent of the immunity and the remedy against the envoy. An envoy occupies a complicated position,¹⁴ and there are several interests involved which should be clearly distinguished. These are: (A) the interest of a state in its envoy, (B) the individual interest of the envoy, (C) the interest of the receiving state, and (D) the interest of the individual members of the receiving state. A few words as to each of them in the order named.

THE INTEREST OF A STATE IN ITS ENVOY.

§166. A state obviously has an interest¹ in its envoy because he is the personal representative of the state and its official mouth-piece or organ of communicating with the receiving state. The dignity, the honor, the independence of superior political power of the sending state are all, therefore, involved in the interest which it has in its envoy, and a damage to the envoy personally will be a damage to that interest of the sending state. If, therefore, the envoy is insulted, maltreated, killed, his property taken away from him, put in jail or otherwise subject to personal indignities, the interest of the sending state is involved. The independent states of the world have always been quick to resent any such acts of damage to their envoys, and rightly so, as the common people attach great importance to the outward show and pomp of states, and it is important for every state to maintain its position in the respect of the world at large. Furthermore, people will, if allowed, show towards a state the respect which they really feel for it, and if, therefore, a state is not worthy of full international respect, unless insistence is made upon the diplomatic forms and outward observances, the

¹⁴ The status of the ambassador is composed of (a) rights *stricti juris* resting upon the basis of natural law and therefore immutable and usually described as inviolable. (b) privileges not originally immutable but rational and hallowed by usage so as to be universally presumed as a matter of

strict right unless abrogated before the arrival of the ambassador and described under the title "extra-territoriality;" 2 Phillimore, Int. L., 3 ed. (1879-1888) 186. See Resolutions of the Institute of International Law at meeting of 1895, Carnegie Ed., 119.

¹ See §104, ante, on state interests.

result will be that a difference will appear in the treatment of envoys of different states which will naturally arouse jealousy and resentment. The principle of diplomatic intercourse, therefore, appears to be to insist upon outward ceremonies and forms of respect and treatment which will be uniform for all envoys of the same rank, and therefore reduce to a minimum any invidious distinction between different independent states of the world. The same rules apply in polite society in municipal life. Certain forms of etiquette are observed in order that all may for the time being appear on that plane of equality which is necessary to free social intercourse.

THE INDIVIDUAL INTERESTS OF THE ENVOY.

§167. The envoy obviously has an interest as an individual apart from his status as envoy, in himself, his family, his property and other interests he may have in the state. Any act done, therefore, damaging those interests, is an act to be considered, and as to those he will have the same means of redress which any other alien within that state will have. The only question which will arise here is whether his status as envoy precludes him from pursuing the ordinary means of redress open to individuals.¹ The acts of damage to the receiving state will next be considered.²

INTEREST OF THE RECEIVING STATE.

§168. The receiving state obviously has an interest in its safety, its internal affairs, the protection of the interests of its individual members, any or all of which may be damaged by act of the envoy. The delicate question which arises here is: how far may the receiving state proceed in order to protect its interests? It seems perfectly clear that it is improper for any state to interfere in the internal affairs of another state, and the conviction against such action is growing stronger with the increase in the stability of modern democracy.^{3*} The members of the receiving state have interests which may be damaged by an act of the ambassador, and the question here is whether the redress ordinarily appropriate in such a case is restrained out of respect for the superior interest of the sending state in its representative.

¹ See §196, post, on envoy as complainant.

² See Chapter 9 on conflicts in state jurisdiction, and §690, post, as to action

of German envoys in 1914-18 in neutral countries.

^{3*} See §§509, 510, post, on intervention.

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History and Theory

HOW INTERESTS AFFECTED.

§169. The various interests may be affected by (A) act of the receiving state, which may be a municipal or international act, (B) act of sending state, (C) act of third state, (D) act of individuals.

HISTORY AND THEORY OF IMMUNITY.

§170. An envoy in ancient times was invested with a religious character and his person surrounded by a sanctity which protected him from personal harm,⁴ but in the violence of the middle ages he appears to have had less immunity. Beginning with the 16th century, different ideas prevailed under the influence of civilization, chivalry and general softening of manners, and the notion of the immunity of the envoy has gained in strength, and is now thoroughly accepted in the modern world.⁵ The question now is, admitting the conceded immunity of the envoy in fact—what are the theories involved in that immunity, how is it protected, and how far does it extend? ⁶

A number of different theories have from time to time been advanced by the writers to explain the immunity of the envoy, that is, to point out why he occupies the particular position he does.

⁴ Ayala, *Law of War*, (1582) Carnegie Ed. I. IX. 1, 2; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. V. 3.

⁵ If anyone should argue that the external factors determining the conduct of independent states have no force, it is only necessary to point to barbarous and medieval Germany in 1914 and 1918, in her conduct with respect to the envoys of foreign powers with which she went to war. Even this nation of baby-killers and violators of every rule of humanity and decency, let the envoys escape with their lives and papers.

⁶ Historical Instances of Immunity.—As to ancient cases, see Zouche, *L. of Nations* (1650), Carnegie ed., Part I. II. 4. For discussion of Egyptian and Roman practice as to inviolability of herald, see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 191 et seq. Roman law and practice during middle ages; 2

Phillimore, *Int. L.*, 3 ed. (1879-1888) 194-198; Vattel, (1758) Chitty's Trans. Book IV. §103. Envoys from the 11th to the 15th century were treated with little consideration. When Charles V. of France sent envoys to "Edward the Black Prince" at Bordeaux to summon him to answer certain complaints which were preferred against him, he was advised by his barons to put the messengers to death. He, however, ordered them thrown into prison; 1 Ward, *Hist.*, (Dublin, 1795) 168. 1258—Elizabeth, Queen Dowager of Sicily, sent ambassadors, on behalf of her son, to Mainfroi, who had possessed himself of the kingdom, and these deputies exercising their function with too much freedom, were seized and put to death by that hardy usurper; 1 Ward, *Hist.*, (Dublin, 1795) 170. 1350—The Pope's legate was hung up by the heels by Dom Pedro, King of

It has been supposed by some that the immunity proceeds upon an implied agreement between the sending and receiving state, that the envoy enters the country under an implied contract.⁷ The basis of this theory probably is in the fact formerly prevailing in Europe, that freedom of movement of individuals between independent states was almost unknown, and members of one state ventured into the jurisdiction of another state only by consent of the heads of the states concerned—first the consent of his own state to his leaving; and secondly the consent of the other state to his entry. Since, therefore, every such entry was an exception to the general rule of exclusion, it seems to follow that when envoys were sent from one state to another, they necessarily entered under an implied agreement—the agreement of the receiving state to let the envoy enter for the purpose of presenting the public business, the agreement of the sending state to sending, with the understanding that he was to be accorded immunity while on his errand, the notion being that the sending state would not have sent the envoy unless the receiving state had so agreed, and therefore it is to be assumed that there is such an implied understanding between the parties. This theory has a very great deal to commend it.

Arragon, until he took off the excommunication which he had ventured to publish; 1 Ward, Hist., (Dublin, 1795) 170. The custom of the time is shown by the instance related by Ward, Hist., (Dublin, 1795) 1, 171, that when Louis XI. commanded one of his servants, who was not a regular herald, to assume the habit of one and bear a message from him to the English camp, the servant is said to have fallen upon his knees and bewailed his fate as one sent to instant death. The Ottoman Porte until recent times observed the custom of imprisoning foreign ministers as soon as a dispute occurred with the state from which they came, evidently considering them hostages; Martens, G., Law of Nations, (1788) Corbett's Trans. V. V. I. For other instances of imprisonment of envoys by the Ottoman Porte, see Walker, Science, Int. L., (1893) 223 where he states that as late

as 1806 the British minister at Constantinople found it necessary to withdraw by stealth on the outbreak of war. Twiss L. of Nations, Peace, 2 ed. (1884) 367, says it was the custom of the Ottoman Porte to imprison envoys of Christian powers in the castle called the "Seven Towers" until peace was reestablished. 1827—Porte formally declared to Ministers of Austria and Prussia that the "Seven Towers" no longer existed. First waived by Porte in war with Russia terminating in 1812. France appears to have led in the matter of exempting ambassadors. 1 Wildman, Int. L., (1849) 97.

⁷ 1 Halleck, Int. L., 4 ed. (1908) 357; Vattel, (1758) Chitty's Trans. Book IV. c. VII; Wheaton, Elements, Dana's ed. (1866) 156, 157; 1 Wildman, Int. L., (1849) 80. "Sulle Immunita Diplomatiche," (1908) L. A. Tosi-Bellucci. See 3 Amer. J. Int. Law, 1048.

Another theory is the notion of extra-territoriality,⁸ that the envoy prolongs or extends the jurisdiction of his own state into the state to which he is sent, and that his residence becomes part of the territory of his own state, and, to that extent, is carved out of the territory of the state to which he is sent. The fiction of this notion has already been pointed out and strong objections have been made to it. The position of the writers is not clear. While many recognize that the conception is a pure fiction, they seem to refuse to fully ignore it. Like other fictions, it no doubt serves its purpose but may now be freely discarded by clear thinkers. There are several shades of opinion on this subject: one that it is right, the other that it is a fact, another that it is a fiction, and there are, in addition, many different views as to its extent, which views are nothing more or less than the several different views as to the immunity of an ambassador.⁹

It seems as if none of these theories actually meets the case because the fact is that by the practice of independent states, the interests of the envoy and the receiving and sending states are protected in the manner which will be referred to. The real explanation, it is believed, is that it is necessary for the states of the world to make such adjustments and provide such remedy in order that they may maintain intercourse with each other, and the self-interest, therefore, of states, as well as the force of international public opinion, pressure from other states, and of precedent, all combine to limit the power of the state over envoys within its jurisdiction.¹⁰ The immunity of envoy is simply a question of remedy and exemption from the process of the municipal jurisdiction in order to avoid any opportunity being furnished for possible oppression or interference by the receiving

⁸ As to extra-territoriality, see Hershey, *Int. L.*, (1912) 285n²⁷ and see §221, post. It has been pointed out Wheaton, *Elements*, Dana's ed. (1866) 303, n²⁹, that if there is in fact extra-territoriality, the result would be that if a crime were committed within the residence of an ambassador by one native on another, there would be no jurisdiction unless the municipal court had jurisdiction of a like crime when committed in a foreign country, and also that no writ could be served in the embassy on a native. The notion of extra-territoriality was however re-

tained in the Resolutions of the Institute of International Law, at meeting of 1895, Carnegie Ed., 119.

⁹ See Grotius, *Bell. ac. Pacis* (1625), Whewell's *Trans.* II. XVIII. IV. et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 358; Manning, *Int. L.*, 2 ed. Amos. (1875) 110; Martens, G., *Law of Nations*, (1788) Cobbett's *Trans.* V. V.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 460; Twiss, *L. of Nations*, *Peace*, 2 ed. (1884) 366; Wilson & Tucker, *Int. L.*, (1901) 134.

¹⁰ Hall, *Int. Law*, 6 ed. (1909) 167.

state with the discharge of his functions by the ambassador. There is no doubt that the freedom of the envoy from personal restraint gives him independence in discussion and negotiation, which is of vast importance to his own state and necessarily to the state which receives him. While cases have arisen where envoys have been criminals and committed acts which have caused public criticism, yet such cases are rare in modern times, and it is better that a few such guilty persons should escape the usual process of the municipal law, and the freedom and immunity of the envoy be retained, than that such few persons should be punished and the freedom of many envoys having vast interests of states in their hands be subject to compromise.¹¹

PROTECTION OF ENVOY BY SENDING STATE.

§171. The sending state may protect its envoy while he is in the receiving state by state action in several ways, as follows: (A) recall the envoy, (B) demand an apology, (C) treat the envoy of the receiving state in its jurisdiction in the same or a similar manner, (D) exact damages or indemnity, (E) require individuals who have offended against the envoy to be punished in a certain way or delivered over to the sending state for action, (F) exert military or naval force for his protection by invasion of territory of receiving state, (G) proceed to war. A few cases are collected in the note.¹²

¹¹ See Ayala, *Law of War*, (1582) Carnegie Ed. I. c. IX.; Grotius, *Bellic. ac. Pacis* (1625), Whewell's Trans. II. XVIII. III.; Hall, *Int. Law*, 6 ed. (1909) 167 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 456; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 220; Woolsey, *Int. L.*, 6 ed. (1897) 134; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. II.

¹² 1849—Austria withdrew her ambassador from Rome because Austrian flag and arms of the empire were torn down by mob from the residence of the ambassador at Rome. On restoration of the Pope, flag and arms were put up again; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 51. 1885—The crew of a German warship hoisted the flag of the German Empire on the island of Yap,

one of the Carolina group, an island long claimed by Spain. The act so stirred the people of Spain that a great meeting was held in Madrid, attended by more than one hundred thousand people. Later the mob attacked the German embassy and consulate, tore down the shield and flagstaff of the consulate and burned them in the principal square of Madrid. In the end, Spain was compelled to humbly apologize to Germany for the insult to the German Ambassador. The Ottoman Porte sent an envoy to Venice to demand the Island of Cyprus and declare war if it was refused. The Senate of Venice assured him he had no occasion for apprehension over his safety even though the Sultan had imprisoned the Venetian ambassador at Constan-

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PROTECTION OF ENVOY BY THE RECEIVING STATE.

§172. The strongest protection which an envoy has is by act of the receiving state within whose political jurisdiction he is, and which by exercise of that jurisdiction may maintain the honor and dignity of the envoy and by appropriate action restrain individuals within the jurisdiction from molesting or interfering with him. A number of modern states have by municipal law recognized this international obligation, and by legislation endeavored to protect the envoy from acts of individuals within the jurisdiction.

Receiving State and Envoy. Extent of Immunity.

PRELIMINARY.

§173. Since the envoy is within the jurisdiction of the receiving state, that state has in fact absolute power over him, and the question is—how far is the exercise of that power restrained by the factors of international conduct? The restraint marks the extent of the

tinople. Francis I. arrested the Spanish ambassador in retaliation for the arrest of the French ambassador by Charles V.; 1 Wildman, *Int. L.*, (1849) 118. 1708—Russian ambassador was arrested for debt in London. He gave bail and complained to the Queen. Persons concerned were arrested and convicted, subject to a reserved question of law as to how far the acts were criminal, which question was never argued. The Czar demanded that the persons concerned be put to death. Queen Anne refused. An Act of Parliament was passed (7 Anne, Chap. 12), a copy of which, with an apology, was presented to the Czar, who accepted it, and the offenders, at his request, were discharged; 1 Halleck, *Int. L.*, 4 ed. (1908) 361; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 235; 2 Ward, *Hist. (Dublin, 1795)* 299; Woolsey, *Int. L.*, 6 ed. (1897) 146. *Res publica vs. De Longchamps*, 1 Dallas, 111 (1784), Frenchman convicted of an assault and battery on the Secretary of the French Legation. Punished in the municipal

court. The council of state advised that prisoner could not legally be delivered up to France for punishment. (1829) Russian Ambassador, his wife, and almost entire legation murdered in Persia. Persia forced to make humble concessions and mutilate 1500 of the rioters. 1900—Boxer Rebellion, German Ambassador murdered in Pekin. The foreign powers landed troops in China to relieve the foreign legations which were besieged there; 5 Moore, *Dig. of Int. L.*, (1906) 473. United States of America furnished armed guards for the United States legation in Pekin, China; 4 Moore, *Dig. of Int. L.*, (1906) 625, 626. Grotius, *Belli, ac. Pacis* (1625), Whewell's *Trans. II. XVIII. XI.*, says wars engaged in on account of ambassador being ill-used are found in all parts of profane history, quoting Cicero to effect that there is no juster cause of war. See Ayala, *Law of War*, (1582) Carnegie Ed. I. IX. 2. Vattel, (1758) Chitty's *Trans. Book IV. §102*, says it is not lawful to maltreat an envoy by way of reprisal.

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immunity, and the discussion, therefore, of that immunity involves a reference to the act of the receiving state, both of which, therefore, will be discussed together under the several following headings: (A) The protection of the interest of the receiving state by direct action against the envoy when his act damages that interest. (B) Protection of the interest of the sending state by municipal action against individual members of the receiving state who damage the interest of the envoy. (C) Protection of the interests of a member of the receiving state when such interests have been damaged by acts of the envoy. (D) Application of the general municipal law of the receiving state to the envoy apart from any question of redress. There is a distinction to be drawn between acts of the envoy damaging the interests of the receiving state, which are in effect acts of the sending state, and therefore the subject of direct state action against which the immunity of the envoy is weakest, and acts of the envoy damaging interests of a member of the receiving state. In the latter case the damage to the individual interest of a member of the receiving state is lost sight of in the larger and more important question of protection of the interest of the sending state in its envoy.

ENVOY DAMAGING INTEREST OF RECEIVING STATE.

§174. Instances of the envoy damaging the interest of the receiving state are of less frequent occurrence in modern times. In the medieval period and during the time of the existence of personal autocratic governments in Europe, envoys were frequently used as agents to plot against the safety of the throne and the life of the head of the state, and their general acts partook of the roughness of the times and the constant action of the potentates of Europe in interfering with each other's domestic affairs. Any such action of the envoy may be conclusively regarded as being directed by his own state, and therefore an act of the sending state, and to be resented accordingly. An active hostile element such as this within the borders of the state calls for prompt and vigorous action, and envoys so offending were frequently roughly handled even after their immunity had become firmly established. The question was debated among the writers whether it was allowable in such case to imprison an envoy or even put him to death.¹³ In most of the cases which occurred the life of the envoy was spared, and he was merely imprisoned and sent out of the country, and there was strong support of

¹³ Grotius, *Belli, ac. Pacis* (1625), 4 Moore, *Dig. of Int. L.*, (1906) 633; Whewell's *Trans.* II. XVIII. IV. 6, 7; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888)

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the view that in urgent cases the envoy may be put to death or confined to his house.

The manners and conduct of envoys have greatly improved in modern times. Interference by a government in the domestic political affairs of another with hostile intent or with desire to overthrow the government is of less frequent occurrence. The modern limited monarchy or democracy makes the assassination of the head of a state of very little use as a factor in international state action. Consequently we find that the occasion in modern times for violence against the person of the envoy is rare. The instances of misconduct have been generally confined to minor acts of discourtesy, interference in domestic politics, violations of neutrality. The remedy of the receiving state in such a case is to summarily dismiss the envoy by handing him his passports or by requesting the sending state to recall him. Either remedy is appropriate and there seems to be no distinction in practice between them. It might be suggested that the remedy of direct dismissal is more drastic than the request for recall and appropriate, therefore, to graver offences. It seems to lie entirely in the discretion of the receiving state which remedy will be applied. The receiving state is obviously the judge of whether the conduct of the envoy is objectionable. It seems to be the general practice in dismissing an envoy or demanding his recall to specify the conduct of the envoy impelling the action. There may be a difference of opinion between the receiving and sending states as to whether the conduct of the envoy is sufficient to justify the action of the receiving state. The sending state may take offense and employ such international means of redress as may be appropriate to the occasion. Few cases in fact have arisen in the modern world where the question has gone beyond mere protest and discussion between the states concerned. The force of modern public opinion is such that a civilized state will hesitate before making itself ridiculous by dismissing an envoy upon frivolous and childish pretext. If the dismissal relates solely to the conduct of the envoy, the sending state can take no offence. If, however, it is put in such a way as to imply a reflection upon the sending state, then the latter may object to the insult, if any, to his dignity, honor and independence. Some of the cases which have occurred are enumerated in the note.¹⁴

161, 205-208; Vattel, (1758) Chitty's Trans. Book IV. §§94-102; 2 Ward, Hist., (Dublin, 1795) 328, 330 et seq; Wheaton, Elements, Dana's ed. (1866)

301; Zouche, L. of Nations (1650), Carnegie ed., Part I. V. 3.

¹⁴ Pope Julius II. imprisoned the ambassador of the Duke of Savoy and

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caused him to be put to the question as a spy. Pope Paul IV. imprisoned Garcilasso de la Vega, the Spanish ambassador, for conspiring against his government; and replied to the remonstrance of the Duke of Alva that if the ambassador had not exceeded his functions, he would not have been molested; 1 Wildman, *Int. L.*, (1849) 106. 1563—Queen Elizabeth requested Philip II. of Spain to recall the Spanish ambassador who was implicated in dangerous cabals against her government. The Spanish king refused, as he said monarchs were not obliged to recall their ministers for not conforming to the humour or interests of those with whom they were sent to negotiate. Thereupon, the Queen set a guard over the ambassador and caused him to be examined before the Privy Council; 1 Wildman, *Int. L.*, (1849) 110. 1567—Leslie, Bishop of Ross, Ambassador from Mary, Queen of Scots, to Elizabeth, was detected in an attempt to raise a serious conspiracy in favor of Mary against Elizabeth, and he was detained in person and banished from the country in 1573. For a discussion of this case see 1 Halleck, *Int. L.*, 4 ed. (1908) 373; 2 Ward, *Hist.*, (Dublin 1795) 292. The Spanish ambassador in Paris being implicated in a plot against Cardinal Richelieu, for which several persons were executed, was only required to return to Spain without delay; 1 Wildman, *Int. L.*, (1849) 109. 1584—The Spanish Ambassador Mendoza in England plotted to depose Queen Elizabeth, and after some discussion as to how he should be punished, he was ordered to leave the country; 1 Halleck, *Int. L.*, 4 ed. (1908) 373; Woolsey, *Int. L.*, 6 ed. (1897) 145. 1586—L'Aubespine, the French Ambassador, was concerned in a plot against Elizabeth. It was proposed to take off the Queen by poison, or to blow her up by firing twenty

pounds weight of gunpowder under her bed. The plot was revealed, the Ambassador was sent for, but said he would not hear any accusation to the prejudice of the privileges of ambassadors, and it appears that no further proceedings were taken against him; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 206, 207; 2 Ward, *Hist.*, (Dublin, 1795) 314. In the reign of James I. Spanish Ambassadors Inoyosa and Colonna were complained of to the King of Spain for a libel on the Prince of Wales and Duke of Buckingham, but allowed to depart without trial; 1 Halleck, *Int. L.*, 4 ed. (1908) 374; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 208; 2 Ward, *Hist.*, (Dublin, 1795) 317; Woolsey, *Int. L.*, 6 ed. (1897) 145. 1618—The Spanish Ambassador to Venice was implicated in a conspiracy to set fire to the town and admit Spanish troops during the confusion, and his recall was demanded; Walker, *Man. Int. L.* (1895) 72; 1 Wildman, *Int. L.*, (1849) 110; 2 Ward, *Hist.*, (Dublin, 1795) 316. 1654—DeBass, French Minister, was ordered to depart England in twenty-four hours on charge of conspiracy against the life of Cromwell. The minister said that he would communicate with Cromwell personally and prove his innocence, but would not submit to interrogatories before a court; 1 Halleck, *Int. L.*, 4 ed. (1908) 374; 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 209; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 459; 2 Ward, *Hist.*, (Dublin, 1795) 319. The Spanish Ambassador to France engaged in a plot against the throne. The plot was disclosed, but though the crime of the Ambassador was manifest, the King would not suffer him to be punished; 2 Ward, *Hist.*, (Dublin, 1795) 315–316. "In 1666, a hunting party being made at the Court of Vienna, a gentleman in the suite of the Spanish Ambassador endeavored to press into a place reserved for the

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nobility, and was stopped by the Count de Kevenhuller, who being treated with impertinence, gave him several strokes with a cane. The affront produced a serious affray some days afterwards, the Ambassador's train in revenge setting upon the Count in his coach, firing into it with pistols, and piercing it with swords, by which the coachman was wounded, and the Count scarce able to save himself. The guard arriving, the Spaniards retreated to the Hotel de Ville, where they defended themselves till two were disabled, and then yielded. The Ambassador flew to support his domestics, and endeavored to force the Hotel de Ville where they were imprisoned, but failing, went to Court to demand reparation, which he did in such insulting terms, that he was himself put into confinement. In the end, instead of the punishment of the Spaniards, who had been guilty of the greatest outrage, a compromise was made. The Ambassador made excuses for his own passion towards the Emperor, for which he and his domestics were released, and the Count de Kevenhuller declared upon his honour that he did not know that the person whom he originally struck had belonged to the Embassy;" 2 Ward, Hist., (Dublin, 1795) 318. (1677) Charles II. ordered the Spanish Ambassador to quit the kingdom in twenty days because implicated in dangerous cabals against the government; 1 Wildman, Int. L., (1849) 110. 1717—Swedish Ambassador Gyllenburg in London, who was an accomplice in a plot against George I. was arrested, his papers seized, his private cabinet broken into for the purpose. Instead of being immediately sent out of the country, he was detained for a while. Protests were made by other ambassadors in London but afterwards withdrawn. Act justified by Great Britain as necessary for the peace of the country; Hall, Int.

Law, 6 ed. (1909) 171; 1 Halleck, Int. L., 4 ed. (1908) 374; Lawrence, Int. Law, 5 ed. (1913) 311; 1 Oppenheim, Int. L., 2 ed. (1912) 459; 2 Phillimore, Int. L., 3 ed. (1879-1888) 210; 2 Ward Hist., (Dublin, 1795) 329; Woolsey, Int. L., 6 ed. (1897) 146. 1718—The Spanish Ambassador, Prince Cellamare, in France, was placed in custody because he organized a conspiracy against the French Government, and retained in custody until news came of the safe arrival in France of the French ambassador at Madrid. War was declared between the two countries the following year; Hall, Int. Law, 6 ed. (1909) 171; 1 Halleck, Int. L., 4 ed. (1908) 374; Lawrence, Int. Law, 5 ed. (1913) 311; 1 Oppenheim, Int. L., 2 ed. (1912) 459; 2 Phillimore, Int. L., 3 ed. (1879-1888) 213. 1734—The Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the latter and not released till 1736, although France protested; 1 Oppenheim, Int. L., 2 ed. (1912) 472. 1746—The French King persuaded the Dutch Ambassador to write to the English Secretary of State for Foreign Affairs interceding for the life of the Pretender, which was resented by England, and the English Ambassador in Holland obtained a letter of reproof from the Dutch Government to their minister in France in consequence of which he apologized to the English minister; 2 Phillimore, Int. L., 3 ed. (1879-1888) 211. 1793, August 16—United States requested the recall of Edmond C. Jenet, French Minister to the United States, as he had fitted out privateers, violating the neutrality of the United States in several ways, and had spoken contemptuously of the government; 5 Moore, Dig. of Int. L., (1906) 591. 1793—The French Government requested the recall of Gouverneur Morris, Minister

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from the United States to France, on grounds which were not clear; 5 Moore, *Dig. of Int. L.*, (1906) 591. 1804—The Spanish Government requested the recall of C. Pinckney, Minister from the United States to Spain, because of the threatening tone which he assumed in a letter to the Spanish Minister of State; 4 Moore *Dig. of Int. L.*, (1906) 490. 1805—United States requested the Spanish Government to recall Marquis of Casa Yrujo, Minister from Spain to the United States. It appeared that he had denounced an act of congress, attempting to bribe a newspaper to oppose the Government of the United States in actions contrary to the interests of Spain. The Spanish Government gave him permission to return to Spain, but he failed to go, and returned to Washington in 1806. He was there officially informed that his presence was dissatisfactory to the President. He then notified the United States Government that he intended to remain in Washington as long as it might suit the interest of the King and his own personal convenience. He remained for some time afterwards and does not appear to have been forcibly removed; Hall, *Int. Law*, 6 ed. (1909) 299. 4 Moore, *Dig. of Int. L.*, (1906) 508. 1809—The British Minister, F. J. Jackson, made gross and insulting insinuations against the United States Government in official communications, whereupon the United States Government notified him that no further communications would be received from him, whereupon Jackson withdrew from Washington and established his residence in New York. The United States then requested the recall of Jackson, and the British Government replied that the recall should have been made before the notification to Jackson, but nevertheless directed the return of Jackson to England; Hall,

Int. Law, 6 ed. (1909) 299; 4 Moore, *Dig. of Int. L.*, (1906) 512. 1829—Mexico requested the recall of Poinsett, Minister from the United States to Mexico; 4 Moore, *Dig. of Int. L.*, (1906) 491. 1846—Peru requested the recall of Jewett, *charge' d'affaires* of the United States in Peru; 4 Moore, *Dig. of Int. L.*, (1906) 492. 1847—Brazilian Government requested the recall of Wise, Minister from the United States to Brazil, on the ground of his failure to appear at several court fetes, but it appears that he endeavored to release certain Americans who had been imprisoned by the Brazilian authorities, and that he omitted to attend because of failure of the Brazilian Government to release the prisoners. It is not clear whether the United States acceded or not; 4 Moore, *Dig. of Int. L.*, (1906) 495; 1848—British Minister at Madrid warned the Spanish Government, in consequence of instructions from home, of what Great Britain conceived to be the danger of a course the government was taking. The warning was resented, and the Spanish Government sent the minister his passports, with the intimation that he must quit Madrid within forty-eight hours. The reason assigned for his dismissal was that he had mixed himself up with a party opposed to the existing order of things, and that he was guilty of complicity and actual revolt. The British Government responded by dismissing the Spanish Minister in London. There is some difference of opinion as to what the Minister actually did; Hall, *Int. Law*, 6 ed. (1909) 300. 1849—The United States complained of the tone of certain correspondence by M. Poussin, Minister from France to the United States. The United States Government sent the correspondence to France for the consideration of the French Government. That Government did not

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consider that there were sufficient grounds for the recall of the Minister, whereupon the United States Government notified him that it would hold no further communication with him as Minister to France but would furnish every possible facility for him to leave the United States; 4 Moore, Dig. of Int. L., (1906) 530. 1852—United States requested the recall of Mr. Marcoleta, Minister from Nicaragua to the United States. The Nicaraguan Government declined to comply and asked for the reasons, whereupon the United States renewed the request, and it appeared that Mr. Marcoleta had been guilty of a breach of diplomatic confidence. United States Government refused to communicate with this minister for some time, and then, under a subsequent President, he presented new credentials and continued to act as Minister; 4 Moore, Dig. of Int. L., (1906) 497. "In 1856 Secretary Marcy announced to the British Minister, Mr. Crampton, the determination of the President to discontinue further intercourse with him on the ground that he had continued to violate the Neutrality Laws of the United States by participation in the recruiting of troops for the Crimean War after he had been admonished not to do so. His recall had been refused by the British Government which placed a different construction upon our Neutrality Laws than maintained by the United States;" Hershey, Int. L., (1912) 284, n; 4 Moore, Dig. of Int. L., (1906) 533-535. 1863—United States requested the Salvadorian Government to recall Henry Segur, Minister from Salvador to the United States, which was complied with. The grounds were not stated but related to certain alleged attempts on his part to violate the neutrality laws of the United States. Subsequent to his recall he was arrested in New York on the charge of fitting out an expedition

in violation of the neutrality of the United States; 4 Moore, Dig. of Int. L., (1906) 500. 1868—United States requested the Minister from Prussia to bring the attention of his government to the fact that two persons connected with the Prussian Legation had been guilty of a violation of municipal law in fighting a duel; 4 Moore, Dig. of Int. L., (1906) 634. 1871—United States requested the recall of Mr. Catacazy, Russian Minister to the United States. The Russian Government requested a postponement on account of the impending visit of a Russian Grand Duke, to which the United States assented, and the Russian Government recalled him subsequent to or at the time of the visit. The ground of recall was that he had been abusive of the President and personally unacceptable; Hall, Int. Law, 6 ed. (1909) 299; 4 Moore, Dig. of Int. L., (1906) 501. 1888—The United States wrote to Lord Sackville, British Minister to the United States, informing him that the United States Government was not willing for him longer to hold his present official position in the United States, and that accordingly the British Government would be informed of the determination, and stating that he would be furnished with the usual facilities for leaving the country. The grounds for this were that the Minister had answered a letter purporting to come from an unnaturalized Anglo-American residing in California, asking his advice as to whom to vote for in the then pending election. Lord Sackville answered, giving his advice, which later was published by the press. It had been intimated that the United States Government was actuated by political motives in demanding his recall, and that there was really no ground whatever for such action; Hall, Int. Law, 6 ed. (1909) 300n¹; Hershey, Int. L., (1912) 284; 4 Moore, Dig. of Int. L.,

IMMUNITY OF ENVOY AS TO PAPERS.

§175. The papers of an ambassador, including diplomatic dispatches, are usually regarded as inviolable. This inviolability is necessary in order that he may properly communicate with his home government. In some cases independent states have seized the papers of an envoy where the latter has been engaged in plots against the welfare and safety of the state. Such an act seems to be justified as the ambassador by his acts forfeited his immunity which can only obtain while he confines himself strictly within the scope of

(1906) 536. 1895—For the case of the objectionable behavior of the Papal Nuncio Agliardi at Vienna, see 1 Halleck, *Int. L.*, 4 ed. (1908) 473n². 1895—United States Minister requested the recall of Mr. Thurston, Hawaiian Minister to the United States, on the ground that he had furnished interviews to the newspapers and made public diplomatic matters; 4 Moore, *Dig. of Int. L.*, (1906) 503. 1895—Venezuelan Government sent passports to Belgian and French ministers on the ground that they had joined in signing a protocol which the Venezuelan Government deemed insulting. 1898—United States requested the recall of Senor Dupuy de Lome, Spanish Minister to the United States, because of disrespectful comments in a letter to Cuba upon United States statesmen and the government. The minister resigned, however, before the Spanish Government had an opportunity to act; 4 Moore, *Dig. of Int. L.*, (1906) 507. 1915, Sept. 18th—Recall of Constantine Dumba, Austro-Hungarian Minister at Washington requested of Austria-Hungary by United States Government because (1) he had conspired to cripple legitimate industries of the United States (instigating strikes in American munition plants), violating diplomatic privilege by employing an American citizen, protected by an American passport, as a secret bearer of dispatches through the line of the

enemy to Austria-Hungary; 10 American J. *Int. L.*, Supp. Special, 361. 1915, Dec. 4th—Recall of the military and naval attaches of the German embassy at Washington requested in note to German Ambassador by United States Government because of the connection of the attaches with the illegal and questionable acts of certain persons within the United States; Amer. J. *Int. Law*, Special Number, Vol. 10, 363–366. 1917—Count Luxburg, Minister of Germany to Argentine Republic, was handed his passports by the latter government because of his sending unneutral dispatches to his home government through the Swedish Minister, a neutral country, in the war in which Germany was a belligerent. The note of dismissal was as follows: "Mr. Minister: You having ceased to be *persona grata* to the Argentine Government, that Government has decided to deliver to you your passports, which I transmit herewith, by order of his Excellency, the President of the nation. The introducer of embassies has instructions to assist you in your immediate departure from the territory of the Republic. God keep you. H. Pueyrredon. To Count Carl von Luxburg, Envoy Extraordinary and Minister Plenipotentiary of the German Empire." The passport issued to Count Von Luxburg reads: "Considering that his Excellency, Count Karl von Luxburg, Envoy

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his diplomatic functions. A state seizing papers must therefore be able to justify the seizure by showing the character of the documents, and if it fails, the sending state will enter strong protest.¹⁵ When an envoy dies his papers remain in the custody of the secretary or chargé d'affaires of the embassy, and the claim made by the receiving state to interfere in such case and take charge of the papers seems to have been abandoned in face of general opposition.¹⁶

Immunity of Ambassador from Process of Municipal Court.

GENERAL, CIVIL AND CRIMINAL.

§176. The ambassador in his capacity as individual is liable as any other individual is in the case where he has damaged an interest in the jurisdiction or violated any law entailing such remedial process. The superior interest of the sending state in him, however, precludes any such municipal action. Since the sending state is above the political power of the receiving state, it is obviously inconsistent with the dignity and honor and independent status of such state as an independent political body to have its personal representative arrested and brought into court or subject to any judicial process. No such process could issue against the independent state itself and therefore it should not issue against its personal representative.^{16*}

Extraordinary and Minister Plenipotentiary of the German Empire, is leaving the Argentine Republic, the authorities of the Republic are hereby requested to protect him in his passage to the frontier. Given at Buenos Aires, September 12, 1917. Valid to the frontier. Pueyrredon, Minister of Foreign Affairs and Worship." 1917, Feb. 3rd—German Ambassador to the United States dismissed by letter directed to him.

¹⁵ The States General of Holland decided while the President Jeannin resided with them as ambassador from France, that to open the letters of a public minister is a breach of the law of nations. Rome seized the letters which a treasonable junto had committed to the hands of Tarquin's ambas-

sador; 1 Halleck, *Int. L.*, 4 ed. (1908) 355.

¹⁶ Martens, *G.*, *Law of Nations*, (1788) Cobbett's Trans. V. V. 5, points out the discussion which formerly arose as to who should have charge of sealing up the effects of a deceased minister, and states that at Vienna the court refused formerly to leave the sealing up of the effects in such case to the secretary of the embassy or a foreign minister, but was obliged to give way to this point to foreign powers when the latter began to retaliate.

^{16*} Martens, *Book V. V. 5*, Sec. 3, says a minister can be cited before no tribunal except that of the sovereign who sends him, except in the following cases: (1) when he is the subject of the state to which he is sent or in the

Furthermore, the power which the receiving state may have of confining him in a prison or bringing him into court on a process; of compelling him to give testimony may be abused in a manner to interfere with the discharge of his duties as an envoy and to extract from him information which he should not give. Therefore in the case of process issuing out of a court, we have two considerations, the dignity and honor of the state, and the protection of the envoy in the inviolability of his papers and information. Although cases have occurred where the receiving state has endeavored by some political action to afford redress to one of its members whose interest has been damaged by an envoy, the overwhelming force of precedent¹⁷ and international public opinion are against such practice.

service of the state to which he is sent, (2) when he has voluntarily acknowledged the jurisdiction of the state, (3) when as plaintiff he is bound to submit to the jurisdiction to which the defendant is subject, (4) with respect to property that belongs to him in any other quality than that of minister, (5) although exempt from suit while minister, yet the mission once terminated, if he attempts to quit the state without paying his debts, the state may refuse to allow him to depart or at least carry away his property and may even seize on this latter. There are instances of this right having been exercised.

¹⁷ The States General appear to have during the 17th century adopted an attitude of asserting the court had jurisdiction over ambassadors. Thus, the Portuguese ambassador was arrested and detained in prison until he compromised with his creditors. In 1644 the position was taken that the state had jurisdiction over the Swedish ambassador in all matters not concerning his office, to any extent short of subjecting him to personal constraint, or depriving him of the means of subsistence, and an action was allowed against the Spanish ambassador on a contract for the lease of a house. In

1651, however, the States General passed laws protecting the inviolability of ambassadors; 1 Wildman, *Int. L.*, (1849) 102. 1606—The Imperial Ambassador at Venice was guilty of coin-ing, of murder, and of an attempt to assassinate his wife. The Senate complained to the Emperor and procured his recall; 1 Wildman, *Int. L.*, (1849) 111. 1614—The Duke of Savoy sent an envoy to the governor of Dauphine to demand assistance against the Spaniards. While he was waiting at Grenoble for the King's answer, he was imprisoned for murder. On demand of the executive he was released from imprisonment; 1 Wildman, *Int. L.*, (1849) 111. "In 1646, the Ambassador at Constantinople was summoned by the merchants before the Divan to answer some complaints. The Ambassador, representing his privilege, the Grand Vizir said, 'he was aware that it was a thing unheard of to summon an ambassador before the Divan, which would destroy the rights of Ambassadors and the Law of Nations.' It is true, he was afterwards arrested and sent home, but that being solely owing to the revolution in England, and the arrival of a new Minister, has nothing to do with the point;" 2 Ward, *Hist.*,

(Dublin, 1795) 320. 1657—The Minister of the Elector of Brandenburg was arrested in London for debt, but was immediately discharged, and all who were concerned in arresting him committed to prison; 1 Wildman, *Int. L.*, (1849) 101. In 1651, the Danish Ambassador having been dismissed, his creditors applied for an order of arrest, which, however, was refused. In 1679, the furniture and effects of the Danish ambassador were seized. A decree was subsequently passed by the States General exempting foreign ministers and their attendants and goods from arrest or execution for a debt; 1 Wildman, *Int. L.*, (1849) 101. 1653—Sa, a brother of the Portuguese Ambassador and one of his train, quarreled with one Genard and wounded him. The next night, Sa, with other Portuguese, came to the same place and killed one person and wounded many. Commonwealth required the ambassador to give up Sa, which was done, and he was tried, found guilty and suffered death; 1 Wildman, *Int. L.*, (1849) 108; Woolsey, *Int. L.*, 6 ed. (1897) 146. Marville, the French minister at Milan, was executed for murder, and an ambassador in Portugal and the Venetian ambassador at Milan were put to death for adultery; 1 Wildman, *Int. L.*, (1849) 107. 1668—Portuguese resident at the Hague was arrested and imprisoned for debt; Vattel, (1758) Chitty's *Trans.* Book IV. §110. In the time of Louis XIV. some horses of the Venetian ambassador, in the care of servants wearing his livery, were seized for his debts, the action being allowed on the ground that the ambassador had taken leave of the court and his successor had arrived. The King, on complaint of the ambassador, ordered all persons concerned in the seizure imprisoned and the municipal authorities rebuked; 1 Wildman, *Int. L.*, (1849) 97. 1708—Russian ambassador

arrested for debt in London. He gave bail and complained to Queen Anne, whereupon the persons concerned in the arrest were prosecuted; 1 Halleck, *Int. L.*, 4 ed. (1908) 61. 1772—The French Government refused the passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts. All the other envoys in Paris complained of this act of the French Government as a violation of international law; 1 Halleck, *Int. L.*, 4 ed. (1908) 392; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 465. Cited by Hall, 175, as a means of compelling the envoy to pay his debts, less offensive than by a suit in a local court. He does not mention the protest of envoys, although (on p. 172n¹) he criticizes De Martens for failure to note in a certain case that the complaints were withdrawn. For further discussion see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 230, 231, who says that he, Landgrave, was compelled to make arrangements with the creditors of the baron before the latter could obtain his passports, and criticizes it as a violation of international law. 1828—An individual in Philadelphia had the Secretary of the Spanish Legation arrested upon a warrant. Procedure instituted against the party who swore out the warrant, who was acquitted at the trial. It appeared that he was ignorant at the time he swore out the warrant of the public character of the Secretary of the Legation, and that the warrant was not actually executed; 4 Moore, *Dig. of Int. L.*, (1906) 633. As to the controversy between Mr. Jay, American Minister at Vienna in 1873, with his landlord, see 4 Moore, *Dig. of Int. L.*, (1906) 635. It appeared that the proceedings were disposed of satisfactorily to the minister. For a review of the controversy between the United States and the Prussian Government over the right of the landlord

IMMUNITY FROM SUBPOENA AS A WITNESS.

§177. The appearance of an envoy in a municipal court as a witness is liable to compromise the dignity of his state, as he becomes subject to cross-examination, which, as it involves a test of credibility, might be construed as a reflection on his personal veracity. If the appearance is compulsory under a subpoena, there is a still

in Berlin to detain goods of the United States Minister found on the premises, as security for damages due by lessees during the term, see 1 Halleck, *Int. L.*, 4 ed. (1908) 366; 4 Moore, *Dig. of Int. L.*, (1906) 646, 648; Wheaton, *Elements*, Dana's ed. (1866) 307 et seq. The controversy was terminated as between the parties, the proprietor of the house restoring the effects which had been detained on the payment of compensation for the damage done the premises, 1878—A justice of the peace in the State of New York issued a summons in debt at the suit of an American citizen against the Spanish minister in the United States. The minister admitted service and returned the summons to the justice, calling his attention to the United States statutes conferring immunity upon foreign envoys. The justice endorsed "The Court decides that a Spanish Minister is just as liable to answer in this court for the payment of his debts as any other person." No other proceedings, however, were taken. United States appears to have brought the matter to the attention of the Governor of New York for measures against the justice of the peace: 4 Moore, *Dig. of Int. L.*, (1906) 639. 1881—The Sheriff of Newport County, R. I., personally served judicial process upon the Russian Minister in the United States. United States Government admitted the service in question was a violation of diplomatic privilege, and suggested to the Governor of Rhode Island that if the proceedings

should continue, the attorney general of the state should call the Minister's privilege to the court's attention and moved for a termination of the proceedings. It appears that these steps were taken; 4 Moore, *Dig. of Int. L.*, (1906) 639. 1892—An attaché of the Swiss Legation at Washington was arrested at Bay Ridge, Maryland, by a deputy sheriff on complaint of a woman who lost her pocketbook and charged the attaché with having taken it. The deputy sheriff refused to recognize the character of the attaché and took him before a magistrate for examination. United States Government, on being notified, expressed its regret and submitted the matter to the Governor of Maryland, who caused the deputy sheriff to be discharged, and expressed regret which the Swiss Government accepted as satisfactory; 4 Moore, *Dig. of Int. L.*, (1906) 635. Mr. Gurney, Secretary of the British Legation at Washington, was fined by the police magistrate of Lee, in Massachusetts, for violating traffic regulations, but the judgment was afterwards annulled, and the fine imposed remitted; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 473, n³. See §179, post, as to immunity of suite. 1911—French consular agent arrested at Alcazar in Morocco by Spanish who were temporarily in occupation. Released immediately and formal apology subsequently tendered by Spain. This consul had, under the circumstances of the case, the immunity of an ambassador.

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Suite

further submission to the municipal jurisdiction. Independent states have therefore uniformly taken the position that their envoys are exempt¹ from the necessity of obeying such a subpoena and have often refused to permit a voluntary appearance but in some cases they have allowed it. Few cases have arisen, but opinion and practice seem to agree in favor of the position of the sending state. Sometimes permission is given for the envoy to give his testimony by deposition which does not involve a personal appearance in court.² A few cases are referred to in note³.

Suite of Envoy.

PRELIMINARY.

§178. The suite of the envoy consists of the persons accompanying him, and may be divided into (A) official, (B) domestic, (C) servants.⁴ The official includes the various functionaries and

¹ Hall, Int. Law, 6 ed. (1909) 182; 1 Halleck, Int. L., 4 ed. (1908) 379.

² See §196, post, on ambassador as complainant.

³ In 1856, when the Dutch Minister refused, upon application by the Secretary of State, to appear as a witness in a homicide case, the United States Government requested the Netherlands Government to authorize the minister to appear, which the latter refused, but compromised by giving him permission to give his testimony under oath at the State Department, which declaration was not taken because inadmissible; 4 Moore, Dig. of Int. L., (1906) 643, 644; Wilson & Tucker, Int. L., (1901) 179. Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 466, says that the United States requested the recall of the Dutch Minister, but that does not appear in Moore. 1880—Senor Commanto, minister from Venezuela, voluntarily appeared and gave evidence at the trial of Guiteau for assassination of President Garfield; 4 Moore, Dig. of Int. L., (1906) 644. 1901—The Secretary of the American Embassy at Rome was authorized to give testimony in a com-

mon law proceeding in an Italian court, provided it could be given consistently with his representative dignity, with an indication that personal deposition at the embassy was preferable; 4 Moore Dig. of Int. L., (1906) 646. Accordingly, the unauthorized act on November 16, 1893, of the charge d'affaires ad interim of the United States in the City of Mexico, in answering certain interrogatories addressed to him by the judge of a Mexican court, was disapproved by the United States Government; 4 Moore, Dig. of Int. L., (1906) 645.

⁴ (1) Counsel to the mission, (2) secretaries, (3) military and naval attachés, (4) interpreters and dragomans, (5) clerks and accountants, (6) couriers, (7) chaplain, (8) doctor: Grotius, Belli. ac. Pacis (1625), Whewell's Trans. II. XVIII. VIII. See 1 Oppenheim, Int. L., 2 ed. (1912) 472, 473; 4 Moore, Dig. of Int. L., (1906) 437; Vattel, (1758) Chitty's Trans. Book IV. §120 et seq.; Wilson, Int. L., (1910) 166; Wilson & Tucker, Int. L., (1901) 160; Zouche, L. of Nations, (1650), Carnegie ed., Part I. IV. II. 3, II. IV. 25.

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officials attached to the mission. The domestic suit consists of the wife and children, if any, and (C) of the servants attached in menial capacity to the legation. The size of the suite has decreased very much in modern times in civilized countries. It is not necessary or customary now for the ambassador to take armed retainers, provide a chaplain or doctor, etc. The ambassador on arriving at the capital notifies the foreign office of the receiving state of the number of his suite and the names of its members so that the fact of their immunity may be easily ascertained. There seems to be no reason why the receiving state should not, if it sees fit, limit the size of the suite. The principal question is as to the immunity.

OFFICIAL SUITE.

§179. The official suite of the envoy comprises the attachés, secretaries, clerks and other assistants in transacting the official business above the grade of servants. Some of these are diplomatic attachés having the same immunity as the head of the legation. Others will only have an immunity because of their official connection with the legation.⁵

The immunity of the members of the official suite proceeds on the same grounds as the immunity of the ambassador himself, and when the circumstances of the case in question occur within the legation, is complicated or rather reinforced by the immunity, if any, attaching thereto.⁵

⁵ Vattel, (1758) Chitty's Trans. Book IV. §122.

⁶ The Spanish ambassador was detected in a plot to procure the town of Marseilles to be betrayed to the King of Spain. The secretary of the ambassador was detected in communication with one of the plotters and they were both arrested. The ambassador protested against the imprisonment of his secretary, and was released by the French King Henry IV. on condition that he be sent home immediately; 1 Wildman, Int. L., (1849) 109; 2 Ward, Hist., (Dublin, 1795) 316. 1641—Cuthbert Clapton was condemned to death on the charge of being a Popish priest, notwithstanding his plea that he was interpreter to the Venetian ambassador. The king subsequently

pardoned him; 1 Halleck, Int. L., 4 ed. (1908) 356n¹. 1805—Dupont v. Pichon, 4 Dall. 321 (1805), the charge d'affaires of France in the United States was served with a *capias* in a suit brought against him on certain bills of exchange. He claimed his diplomatic privilege and the court held that he was entitled to that privilege until his return to France, and he was discharged absolutely from the process, it appearing that there was danger that it would be executed. 1904—Mr. Gurney, Secretary of the British Legation at Washington, was fined by the police magistrate of Lee, in Massachusetts, for violation of traffic regulations, but the judgment was afterwards annulled and the fine imposed remitted; 1 Oppenheim, Int. L., 2 ed. (1912) 473n².

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Suite

DOMESTIC SUITE.

§180. The domestic suite comprises the members of the envoy's family and the members of the family of the attachés having immunity, and it is obviously necessary that they be protected and on the same plane as the ambassador himself so that his mind may be at ease in discharging his official duties as to the safety of those who are nearest to him.⁷

The widow of an ambassador who has died abroad is entitled, as a matter of courtesy, to the same immunity as the deceased ambassador provided she leaves the country with due expedition. Prior to the 17th century, ambassadors were never accompanied by their wives and few precedents have occurred as to them. A few cases as to domestic suite are referred to in the note.⁸

SERVANTS.

§181. The servants of an ambassador have a limited immunity which they derive entirely from their connection with the ambassador and not because of a representation of the sending state.⁹ The immunity is only for the comfort and convenience of the ambassador

⁷ Martens, Summary, (1788) Cobbett's Trans., V. IX. 1. n, points out that prior to the 17th century foreign ministers were never accompanied by their wives, and refers (in note) to the jeering remark, in 1649, of the French ambassador in Holland to the Spanish ambassador for the latter having his wife with him, observing that "he was an hermaphrodite ambassador." For difference of view in ancient times, see Zouche, L. of Nations (1650), Carnegie ed., Part II. IV. 11.

⁸ 1653—Don Pantaleon Sa, the brother of the Portuguese ambassador in London and a member of his suite, killed an Englishman named Greenway. He was arrested, tried in England, found guilty and executed; 1 Halleck, Int. L., 4 ed. (1908) 374; Lawrence, Int. Law, 5 ed. (1913) 312; 2 Phillimore, Int. L., 3 ed. (1879-1888) 211, 212; 2 Ward, Hist., (Dublin, 1795) 322-324. 1902—W. Godfrey Hunter,

son of the United States minister of Guatemala, an attaché of the legation, implicated in a murder. 1906—Carlo Waddington, the son of the Chilean envoy at Brussels, murdered the secretary of the Chilean Legation. The Belgian authorities did not take any step to arrest him. Two days afterwards, however, the Chilean envoy waived the privilege of the immunity of his son, and on March 2 the Chilean Government likewise agreed to the murderer being prosecuted in Belgium. The trial took place in July, 1907, but Waddington was acquitted by the Belgian jury; 1 Oppenheim, Int. L., 2 ed. (1912) 475. See Vattel, (1758) Chitty's Trans. Book IV. §121.

⁹ There is a considerable diversity of opinion and practice as to immunity of domestics as non-official members of the diplomatic suite; Hershey, Int. L., (1912) 294n⁹⁷.

himself, and while the servants are in the embassy, they are protected by the inviolability of the legation. While they are outside, they have no immunity unless actually engaged in the personal service of the ambassador or some member of his suite having immunity. It would obviously be derogatory to the dignity of a diplomat to arrest his chauffeur while driving the diplomat in the street, and perhaps leave the latter stranded until he could procure another conveyance. A few cases are referred to in the note.¹⁰

¹⁰ The Spanish ambassador to the Hague sent home in chains one of his Spanish servants who had attempted to commit a serious offense that he might be punished and sent to the galleys in Spain; 1 Wildman, *Int. L.*, (1849) 127. A domestic servant of the French ambassador at Rome was put to death for having broken the chain of the galley slaves to rescue a prisoner; 1 Wildman, *Int. L.*, (1849) 107. The King of Spain caused some of the Venetian ambassador's domestics, who had been guilty of a grave offense, to be seized in the house of the ambassador. The King of Spain is said on that occasion to have sent a circular letter to all the courts to declare that if his ambassadors committed any offense, he was willing that they should be tried by the laws of the country in which they were sent to reside; 1 Wildman, *Int. L.*, (1849) 107. 1601—The servants of the ambassador from France to Spain had quarreled with some Spaniards in which two of the latter were slain, of whom one was a priest. The servants were seized with a view of trying them, but upon the ambassador's complaint and retirement from Spain, they were delivered into the hands of the Pope at Rome and finally released; 2 Ward, *Hist.*, (Dublin, 1795) 315. 1825—Secretary of the Russian Legation at Washington complained of a violation of his diplomatic privileges by a constable of Georgetown who attempted to enter his dwelling for

the purpose of arresting a domestic of the Secretary, it appearing that the domestic was charged with assault and battery. The Secretary agreed that the domestic might surrender himself to be dealt with according to law; 4 Moore, *Dig. of Int. L.*, (1906) 656. 1825—United States informed a United States marshal that he could with propriety serve a writ upon the coachman of the Minister from the Netherlands anywhere outside the embassy except when the coachman was employed in the service of the minister; 4 Moore, *Dig. of Int. L.*, (1906) 656. 1827—A coachman of Mr. Gallatin, the American Minister in London, committed an assault outside the embassy. He was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognize the exemption of the coachman from the local jurisdiction although admitting the propriety of giving notice to minister of the arrangements for arrest; 1 Halleck, *Int. L.* 4 ed. (1908) 375; 4 Moore, *Dig. of Int. L.*, (1906) 656; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 474, n¹. 1860—United States of America informed the Peruvian minister that a coachman in his service had been charged with assault and battery, and that the Government would thank the Peruvian minister to discharge the coachman in order that justice might take its course, which the minister did; 4 Moore, *Dig. of Int. L.*, (1906) 660. 1879—United States of

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Domicile

Immunity of Domicile.**PRELIMINARY.**

§182. Ambassadors usually reside at or near the capital of the state to which they are sent, and generally have the office of the embassy in the same house as that in which they reside, which residence was sometimes called the hotel of the ambassador. The place of residence is fixed near the capital for convenience in the transaction of business.¹¹ It is not customary for the receiving state to impose any restrictions on the discretion of the ambassador in selecting the place of his residence. It is clear that the residence of the envoy must be immune from any act of the receiving state in order that he may be unhampered in the discharge of his duties, and to preserve the privacy of his papers and correspondence. On the other hand, the receiving state cannot permit any regard for the sanctity of the ambassador's residence to restrain any act on its part necessary for the safety and preservation of the state. The ambassador may be properly said to forfeit the immunity when he steps beyond the functions of his office and enters upon conduct damaging the interest of the state to which he is accredited. The receiving state acts at its peril in violating the immunity of the envoy's domicile.¹² If it turns out that the act was not justified, and

America took the attitude that its representative should be advised against questioning the [power] right of a government to enforce compulsory military service against a native servant in the employ of the envoy; 4 Moore, Dig. of Int. L., (1906) 661. 1883—It appears that by Turkish municipal law the Ottoman cavasses and dragomans employed in foreign consulates were exempt from military service for a term of five years. The Turkish Government informed foreign legations, the period having expired, that the persons in question would be considered liable to military service, which the envoys admitted; 4 Moore, Dig. of Int. L., (1906) 662. 1899—A French servant employed by the Spanish minister in Berlin was charged with an assault on

another [German] servant of the Spanish ambassador. The German Government took no proceedings as long as the Frenchman remained in the ambassador's service, but upon his discharge he was arrested and prosecuted under the municipal law; 4 Moore, Dig. of Int. L., (1906) 662.

¹¹ The ambassador sometimes temporarily resides at points distant from the capital, *e. g.*—in the United States of America, diplomats frequently rent residences at resorts during the summer months. No distinction has ever been drawn as to these cases as the immunity depends on the fact of residence, not on its proximity to the capital.

¹² See §296, post, on the analogous case of visit and search on the high seas.

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the ambassador innocent, then apologies are due to the sending state. If, on the other hand, the ambassador appears to be in the wrong, the receiving state must stand by its act and be prepared for whatever consequences ensue.¹³ Cases where any such action is necessary in modern times are exceedingly rare.

Several questions present themselves for discussion: (A) the title to the domicile, (B) the immunity generally referred to, as asylum of the house from being invaded or damaged by any act of the receiving state or any of its members without the consent of the ambassador, which will be referred to in the order named.¹⁴

TITLE TO DOMICILE.

§183. The domicile of the envoy may be rented or the sending state may purchase a building for the purpose of an embassy in the territory of the receiving state. The immunity, however, arises from the envoy's occupancy of the house in his official capacity, and no distinction has ever been made between immunity of buildings owned or rented by the sending state. When the embassy is pur-

¹³ See Hall, *Int. Law*, 6 ed. (1909) 178 et seq.; Vattel, (1758) Chitty's *Trans.* Book IV. §117.

¹⁴ The immunity of the domicile of the ambassador may be considered with reference to the following cases:

(A) Act of receiving state, member of receiving state, member of third state.

(a) Damaging the building,

(b) Affecting persons within the domicile.

(1) Having diplomatic immunity outside.

(2) Connected with the legation having no diplomatic immunity outside.

(3) Members of sending, receiving or third state who have taken refuge inside.

Criminals,

Political refugees.

(c) Affecting property within the building belonging to

(1) The sending state or members of the legation having immunity outside.

(2) Persons attached to the legation not having immunity outside.

(3) Members of sending, receiving or third state.

(B) Exercise of jurisdiction by sending or receiving state as to conduct within the building by

(a) Persons having immunity outside.

(b) Persons attached to the embassy having no diplomatic immunity outside.

(c) Member of sending state.

(d) Member of receiving state.

(e) Member of third state.

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chased, the title necessarily must be taken in accordance with the municipal law of the receiving state.¹⁵

ASYLUM IN DOMICILE OF ENVOY.

§184. The word "asylum" formerly signified a place within which a fugitive could be safe from pursuit, and from which he could not be taken without violating the sanctuary. This privilege was of great practical importance in the days of self-help and the recognition of private vengeance. The constitution and maintenance of these places was perhaps the first step toward securing peace and order out of the chaos and unregulated violence of the middle ages. With the establishment of justice administered by the state, the need for an asylum disappeared. Indeed, an asylum could not be maintained against judicial authority without weakening the latter.

¹⁵ In 1814 Austria and Great Britain purchased houses for their foreign ministers in Paris, and, in 1817, Prussia likewise purchased houses in Paris and Petrograd. Sometimes extraordinary ambassadors have quarters provided for them by the state to which they are sent and houses for the reception of foreign ambassadors were in use during the reign of the Emperor Charlemagne; Woolsey, *Int. L.*, 6 ed. (1897) 138n². Stat. 13 and 14, Vict. c. 3 (Private Act), 1850, enables the minister of the King of Prussia to purchase a residence in London for the use of the Prussian Legation, and regulates the future holding of the same. The residence is held in trust for the King of Prussia, his successors and assigns; 1 Halleck, *Int. L.*, 4 ed. (1908) 354, n²; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 243. United States of America—When Washington was laid out, certain lots were reserved and offered free by the United States Government to enable foreign powers to build residences for their representatives, but no government has availed itself of the offer, which has lapsed by the passing of time; 4 Moore, *Dig. of Int. L.*, (1906) 670. The British Embassy at Washington stands

in fee in the name of "The Commissioner of Works and Public Buildings of Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland," and is assessed at a valuation but noted as exempt from the payment of all general taxes; 4 Moore, *Dig. of Int. L.*, (1906) 671. The United States Government informed the minister from Venezuela that the question as to how he could take title to a house he purchased in New York depended on the laws of the State of New York, but that his domicile was safe from intrusion whether occupied by him either as owner or tenant. It appeared that he proposed taking the deed in his name as minister of Venezuela in the United States; 4 Moore, *Dig. of Int. L.*, (1906) 648. It appears the United States is not the owner of real estate abroad except at Tangier, Africa, which property was donated. In China and Japan contracts for legation premises are authorized by an act of congress. See 4 Moore, *Dig. of Int. L.*, (1906) 671. Act of February 17, 1911, to provide for purchase of embassy, legation and consular buildings, see 5 *American J. Int. L.*, Supp. 128.

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The privilege was supposed to be a privilege of the fugitive which he could claim if he reached the particular spot.¹ We must distinguish between asylum of the territory of a state² and asylum of a legation or ship³ within the jurisdiction of another state. In the former there is no doubt as to the fact that the jurisdiction clothes the refugee with immunity from pursuit by his home state. The discussion in this chapter will be confined to the case of a legation.⁴

Soon after the establishment of permanent embassies⁵ the custom grew up of considering the dwelling of the ministers or envoys as an asylum for persons who might flee there from violence or legal persecution. The interest of the sending state in the immunity of the envoy's residence from the local jurisdiction was extended to cover individuals subject to the jurisdiction of the receiving state. This privilege was greatly abused and many ambassadors made large sums of money by extending their protection to various buildings in exchange for compensation. In many places this immunity was extended to a part of the city, as Madrid, Venice and Rome, where there existed what was known as the freedom of the quarter of the city where the ambassador resided.⁶ The improvement in administration of the municipal law and the general increase in order have

¹ As to history, see 2 Moore, Dig. of Int. L., (1906) 845-883; 1 Oppenheim, Int. L., 2 ed. (1912) 461; Twiss, L. of Nations, Peace, 2 ed. (1884) 367; Vattel, (1758) Chitty's Trans. Book IV. §118; Woolsey, Int. L., 6 ed. (1897) 139; 1 Westlake, Int. L., 2 ed. (1910) 281 et seq.; Zouche, L. of Nations (1650), Carnegie ed., Part II. IV. 21. The immunity was generally referred to as "Franchise de l'hotel," "Franchise du quartier," "Jus quarteris-rum."

² See §462, et seq., post, on extradition.

³ See §§322, 326, post, on vessels in maritime belt.

⁴ An asylum is to be distinguished from an overt act of an ambassador seizing an individual and taking him in the embassy or restraining him of liberty when within the embassy. The essence of asylum is that the individual

has voluntarily gone within the place in question and remains there of his own free will. 1896—Sun Ya Sen, a political refugee from China, living in London, was induced to enter the house of the Chinese Legation and kept under arrest there in order to be conveyed forcibly to China, the Chinese envoy contending that, as the house of the legation was Chinese territory, the English Government had no right to interfere. But the latter did interfere and Sun was released after several days; 1 Halleck, Int. L., 4 ed. (1908) 376; 1 Oppenheim, Int. L., 2 ed. (1912) 464.

⁵ This, as we have seen, was in the 17th century. See §154, ante.

⁶ As to Italian view and the immunity at the Vatican, see 1 Westlake, Int. L., 2 ed. (1910) 283. Many Popes attempted to abolish the privileges of the ambassadors at Rome, but without

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resulted in the complete abandonment of the practice, and no independent state would now think of claiming it in any country where there is a semblance of the preservation of law and order. In some countries, as in the South American republics, where there is considerable disturbance in political conditions from time to time, the privilege of asylum of legations is claimed on behalf of political refugees and seems to exist in practice to a considerable extent.⁷

success. In 1815 the right of asylum was abolished in Rome except as to persons charged only with misdemeanors; 1 Wildman, *Int. L.*, (1849) 129. See Martens, *G., Law of Nations*, (1788) Cobbett's *Trans. V. V. 7*; Vattel, (1758) Chitty's *Trans. Book IV. §118*. Woolsey, *Int. L.*, 6 ed. (1897) 139, says immunity also existed at Frankfort on the Main during the meetings for the choice and coronation of an emperor. Martens, *G., Law of Nations*, (1788) Cobbett's *Trans. II. II. 2n*, refers to the extreme circumspection made use of by Pope Julius II. before he abolished the privilege of asylum and exemption enjoyed by foreign ministers at Rome in 1686, as illustrating the force of custom.

⁷ The modern law of asylum depends largely on municipal law. In the United States of America it has never existed. In South American and Central American countries asylum has been more generally extended to political refugees. Examples may be found in most of these states. In countries that were formerly Spanish colonies the practice may be said to be inherited; 2 Moore, *Dig. of Int. L.*, (1906) 755-845. 1 Oppenheim, *Int. L.*, 2 ed. (1912) 462, n³, says in South America is local usage. "The right of asylum in the legations of the United States in Central and South America." Barry J. Gilbert, 16 *Har. Law Rev.* 118. As Bynkershoek says, privileges of ambassadors have as their object to enable the discharge of the duties of the

office without impairment or restraint and the sheltering of third persons from justice is not necessary to such object; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 367, 368. Martens, *G., Law of Nations*, (1788) Cobbett's *Trans. V. V., 6*, says that according to natural law it appears that if a minister knows an accused person has taken refuge in his dwelling, he ought not without just reason to refuse giving him up, and if he does so refuse, he is responsible for the consequences of such refusal. (This, however, takes from the minister the power of determining what is the just consequences and vests it in the officials of the state, which necessarily furnishes the same opportunity for fraud and oppression on the minister as if the state officials had the discretion in the first place.) Twiss, *L. of Nations, Peace*, 2 ed. (1884) 368, says an ambassador is, from the principle of extra-territoriality, at liberty to exercise civil and criminal jurisdiction over the personnel of the embassy if so empowered by the sending state in whose discretion the vesting of the power rests; not usual to invest him with criminal jurisdiction except to empower an arrest and sending the offender for trial to the sending state, but that he generally has civil jurisdiction. This, however, is believed to be an erroneous statement of the law, as the jurisdiction of the envoy is not in modern times so extended; Lawrence, *Int. Law*, 5 ed. (1913) 316. Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.*

Even here it is not so much a demand by the sending state of an immunity contrary to the jurisdiction of the receiving state as it is a demand by the members of the receiving state for a privilege in the embassy from which they can find a refuge from each other in time of political turmoil. A few instances are collected in the note.⁸

II. XVIII. VIII. 2, says asylum depends on concession of the receiving state and not part of the law of nations. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 281, 282, says old system of asylum was broken in upon by the desire of the foreign power not to make its legation a harbor for rebels and conspirators against the territorial government, a desire founded on mutual courtesy and sentiment of solidarity of government. That Spain and United States have endeavored to put an end to the practice but it will last as long as the instability of states in these countries. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 282, points out that except in case of personal immunity an individual within the ambassador's residence may be ultimately reached by the territorial jurisdiction although time and convenience of the ambassador must first be consulted as to effecting arrest or serving processes within the legation. "The Practice of Asylum in Legations and Consulates of the United States," Barry Gilbert; 3 *Amer. J. Int. Law*, 562. See 1 Halleck, *Int. L.*, 4 ed. (1908) 380-381; 2 Moore, *Dig. of Int. L.*, (1906) 755, 781; 1 Wildman, *Int. L.*, (1849) 127-129. "Asylum in Legations and Consulates and in Vessels," John B. Moore, 7 *Pol. Sci. Quar. Rev.* 1, 197, 397.

*1847—The house of the Russian Ambassador in Holland was attacked and his windows broken, in consequence of which the States General published an edict imposing penalties on any person attacking the house of the ambassador by day or night, and also imposing penalties on any person who

should hoot or otherwise insult any of his train; 1 Wildman, *Int. L.*, (1849) 102. "A criminal at Madrid, in the time of Philip II., having escaped from justice took refuge in the house of the Venetian Ambassador, and was pursued by an officer, who was told from a window by the Ambassador himself to enter the house, but who was immediately set upon, ill-treated and driven away by the gentlemen and servants of the embassy. The officer complained to the President of Castile, who took information of the whole affair, and ordered the Provosts to send and seize the delinquents. Hearing that they were to be resisted, the Provosts, instead of sending, went themselves, and upon entering, found the Ambassador armed with sword and buckler, and the whole suite prepared to oppose them. They nevertheless, without violence, contrived to amuse the person of the ambassador, while their officers seized several delinquents, among whom was Badoara one of his relations. These were tried by the tribunals of the country;" 1 Halleck, *Int. L.*, 4 ed. (1908) 382; 2 Ward, *Hist.*, (Dublin, 1795) 333. 1867—Nikitschenkow, a Russian subject not belonging to the Russian Legation, in Paris, made an attempt on and wounded a member of that legation within the precincts of the embassy. The French police were called in and arrested the criminal. The Russian Ambassador demanded that he be sent to Russia for trial, maintaining that, as the crime was committed inside the Russian Embassy, it fell exclusively under Russian jurisdiction; but the French

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Government refused extradition, partly on the ground that the immunity of the house has been waived by calling in the police, and Russia dropped her claim; Hall, *Int. Law*, 6 ed. (1909) 179; 1 Halleck, *Int. L.*, 4 ed. (1908) 377n¹; Hershey, *Int. L.*, (1912) 292, n²; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 463; Walker, *Man. Int. L.*, (1895) 76. 1787—Mr. Van Berckel, the Minister of the Netherlands complained to the United States that his diplomatic privileges had been violated by a constable who entered his dwelling in New York and endeavored to arrest and carry off one of his domestics, and although finally obliged to desist, acted in a violent manner and used abusive and insulting expressions. United States Government communicated with the mayor of the City of New York, and the constable was indicted under the common law, there at that time being no statute either of Congress or of New York applicable to the subject. He pleaded "not guilty" but subsequently pleaded "guilty" and was sentenced to imprisonment for three months; 4 Moore, *Dig. of Int. L.*, (1906) 652-653. Servants and employees without diplomatic privileges: 1752—In Russia, two servants of the Swedish Ambassador having been arrested in his house for violation of the local law, the Empress punished the persons who ordered the arrest and addressed an apology to the members of the diplomatic corps; Vattel, (1758) Chitty's *Trans. Book*, IV. §117. Political refugees. Non-diplomatic persons.—1726—The Duke of Ripperda, first minister to Philip V. of Spain, who was accused of high treason and had taken refuge in the residence of the English ambassador in Madrid, was forcibly arrested there by order of the Spanish Government. The British Government complained of the act as a violation of international law; 1 Halleck, *Int. L.*,

4 ed. (1908) 381; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 461; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 242. Walker, *Man. Int. L.*, (1895) 75, says the complaint of the British Government expressly guarded against the advance of any claim that foreign embassies could protect the members of the receiving state against the consequences of offenses committed by them. 1760—The British Ambassador in Berlin declared that he knew of no asylum conferred by an ambassador's house against crimes of state; Walker, *Man. Int. L.*, (1895) 75. For cases of refuge in houses of ambassadors, see 1 Wildman, *Int. L.*, (1849) 127, 128. 1747—A merchant named Springer was accused of high treason and took refuge in the house of the English Ambassador at Stockholm. On the refusal of the English envoy to surrender Springer, the Swedish Government surrounded the embassy with troops and ordered the carriage of the envoy when leaving the embassy to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and called back her ambassador, as Sweden refused to make the required reparation; 1 Halleck, *Int. L.*, 4 ed. (1908) 382; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 461, 462; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 243; Woolsey, *Int. L.*, 6 ed. (1897) 139n¹. 1867—French envoy in Lima claimed right of asylum but the Peruvian Government refused to concede; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 462. The Marquis of Fontenay, French Ambassador at Rome, sheltered certain Neapolitan exiles and rebels and attempted to take them out of Rome in his coaches, but the coaches were stopped at the gates and refugees seized. The French Ambassador complained but no redress was afforded; 1 Halleck, *Int. L.*, 4 ed. (1908) 381. 1873—Marshal Serrano was taken in by

JURISDICTION, EXERCISE OF.

§185. Exercise of state jurisdiction by an envoy involves the doing of state acts, which cannot well be enumerated as they cover a wide range. The principal case which has attracted attention is that of exercise of jurisdiction within the embassy which to that extent involves an exclusion of the jurisdiction of the receiving state.⁹ This is really a question of conflict of jurisdiction between sending and receiving state as to conduct within the embassy, and the extensive jurisdiction formerly exercised by the sending state has gradually diminished in modern times. The chief reason has been the improvement in the manners and morals of ambassadors and their suites, and in the strength and power of the central government, all of which have contributed to furnish fewer occasions for the exercise of the jurisdiction.¹⁰

the British Minister and the Minister of United States promised asylum to the another person; who, however, did not take advantage of the promise. 1875—Representative of the United States of America in Haiti afforded asylum to some political refugees, and his conduct was emphatically disapproved by his government; Walker, *Man. Int. L.*, (1895) 75. 1891—Chilean Civil War. Eighty refugees were received into the American Legation, and a large number were given asylum by ministers of several other states; Hall, *Int. Law*, 6 ed. (1909) 182. A number of cases of asylum are cited Hall, *Int. Law*, 6 ed. (1909) 181, n²; and in article "Asylum in Legations and Consulates and in Vessels," John B. Moore, 7 *Pol. Sci. Quar. Rev.* 1, 197, 397. 1841—The Danish Minister in Madrid sheltered a large number of conspirators against the Government of Spain. 1848—Several ministers of the foreign powers in Madrid gave asylum and the practice was resumed during the revolutionary period between 1865 and 1875. 1862—Greece—refuge was granted to a number of persons during the revolution; Hall, *Int. Law*, 6 ed. (1909) 181n².

⁹ See Grotius, *Belii. ac. Pacis* (1625). Whewell's *Trans.* II. c. XVIII., VIII. 2; 1 Halleck, *Int. L.*, 4 ed. (1908) 376 et seq.; Martens, G., *Law of Nations*, (1788) Cobbett's *Trans.* V. V. 5; Wheaton, *Elements*, Dana's ed. (1866) 303, n¹²⁸; Vattel, (1758) Chitty's *Trans.* Book IV. §124.

¹⁰ 1603—The Duc de Sully, who was sent by Henry IV. of France on a special mission to England, called together a French jury in London and had a member of his retinue condemned to death for murder. The convicted man was handed over for execution to the English authorities but James I. pardoned him; 1 Halleck, *Int. L.*, 4 ed. (1908) 376; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 207; 2 Ward, *Hist.* (Dublin, 1795) 316; Vattel, (1758) Chitty's *Trans.* Book IV. §124. The French claimed that as he was condemned by his own tribunal, the pardon was unauthorized; Woolsey, *Int. L.*, 6 ed. (1897) 144. Hall, *Int. Law*, 6 ed. (1909) 178n, says that capital punishment was inflicted. French Ambassador to England, during the reign of Elizabeth, executed one of his servants for committing a rape on a female of his family; 1 Halleck, *Int. L.*, 4 ed.

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Taxation

IMMUNITY FROM TAXATION.

§186. All property of the envoy, as well as property of the state which sends him, within the jurisdiction of the receiving state, is within the power of that state and subject to taxation, and, in all other respects, subject to the municipal law. How far is the power of taxation restrained by the factors of international conduct? We have two cases to consider—customs duties and internal revenue taxation. It has been pointed out that it was formerly the custom for a state to defray the expenses of a foreign embassy sent to it, which custom continued down to the opening of the eighteenth century and was discontinued by agreement,¹¹ and is now used only in cases of embassy to Turkey and other states out of Europe. The practice of exemption from custom duties was substituted in lieu of paying the expenses of the embassy, and owing to the great abuse by reason of envoys using it as a cloak for smuggling operations,¹² it has been restrained or abolished at many courts, and when retained subsisted during the first six months of embassy only, with allowance for closing of navigation by sea. As to internal taxation, the practice seems to be the same, that is, each state will confer immunity from taxation so far as other states will. If the tax is not paid the

(1908) 376. Spanish Ambassador at Venice hanged one of his servants from the windows of his own hotel; 1 Halleck, *Int. L.*, 4 ed. (1908) 376. 1657—One of the servants of M. de Thou, the French Ambassador in Holland, was arrested for attempt to commit violence upon a woman in the streets. He was released on demand of the ambassador who inflicted punishment; 1 Halleck, *Int. L.*, 4 ed. (1908) 376; 2 Ward, *Hist.*, (Dublin, 1795) 318. 1867—A Russian called at the Russian Embassy in Paris and committed an assault and battery on several persons therein. The police on being sent for entered the embassy and arrested him. The Russian Ambassador, who was absent at the time, on his return demanded that the case should be tried in Russia on the ground that French court had no jurisdiction. French Government refused to give up the prisoner who was tried by French court

with the approval of the French Government; 1 Halleck, *Int. L.*, 4 ed. (1908) 377n¹.

¹¹ Abolished in Russia and Denmark in 1747, in Holland in 1749. 1721—By agreement between Russia and Holland; Martens, *G., Law of Nations*, (1788) Cobbett's *Trans.* V. VII. 1. Houses of ministers were formerly exempt from usual imposts at the Hague but exemption cancelled in 1649; Martens, *G., Law of Nations*, (1788) Cobbett's *Trans.* V. VII. 2n.

¹² Formerly it was common for merchants to represent the minor princes of Europe at the smaller courts, and they did an extensive business in smuggling by bringing in goods free of duty under their ambassadorial privileges. This practice has been abandoned; Woolsey, *Int. L.*, 6 ed. (1897) 144; Walker, *Science, Int. L.*, (1893) 225.

Immunity of Envoy

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municipal law provides a remedy against the property which can be enforced by process and sale without personally involving the envoy himself. It appears from the cases collected in the note that the exemption is purely a matter of comity between the states,¹³ and that one state will exempt if the other state does also. It does not seem as if the payment of such dues could in any way affect the functions or dignity of the envoy. The only operation would be to increase the expense of the mission.¹⁴

FREEDOM OF RELIGIOUS WORSHIP.

§187. In the days of religious intolerance it sometimes happened that an envoy professed a religion different from that protected by the state to which he was sent, and the practice of the rites of his religion would, if done by an individual, be contrary to the municipal law.¹ In such case the envoy was permitted to conduct religious worship within his domicile even though in violation of the law of the

¹³ English ambassador to Spain complained to Queen Elizabeth that his trunks had been opened by the custom house officers. Elizabeth replied that an ambassador had to put up with everything that did not directly offend the dignity of his sovereign; 1 Halleck, *Int. L.*, 4 ed. (1908) 384; Vattel, (1758) Chitty's Trans. Book III. §105. It appears that the United States observes the principle of reciprocity in the matter of taxation of property owned by a foreign government and occupied as a legation, but does not claim exemption from local assessments, such as water rent, etc.; 4 Moore, *Dig. of Int. L.*, (1906) 670. For reference to the proposal by the British Government to the United States for reciprocal immunity from taxation of their respective representatives, see 4 Moore, *Dig. of Int. L.*, (1906) 671. United States of America gives free entry of articles imported for the use of ministers and charge' d'affaires; 4 Moore, *Dig. of Int. L.*, (1906) 673. For instructions to the collectors, see 4 Moore, *Dig. of Int.*

L., (1906) 676, 677, which sets forth the practice of the United States. The Prussian minister at Washington having informed the United States that members of foreign legations at Berlin were exempt from duties of any kind on their residences either belonging to themselves or their government, the United States took steps to relieve the house in which the Prussian minister lived, and which belonged to him, from taxation in the City of Washington; 4 Moore, *Dig. of Int. L.*, (1906) 669.

¹⁴ See Hall, *Int. Law*, 6 ed. (1909) 183; 1 Halleck, *Int. L.*, 4 ed. (1908) 382, 383; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 369; Wheaton, *Elements*, Dana's ed. (1866) 319; Woolsey, *Int. L.*, 6 ed. (1897) 144.

¹ Hall, *Int. Law*, 6 ed. (1909) 183n², relegates the subject "right of chapel" to a note but raises the question whether the ringing of bells might not violate the immunity by provoking public attention to the religious exercise being conducted, and of which the populace would otherwise be ignorant.

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Communications

state to which he was sent.³ This question is now purely of historical interest as freedom of religious worship is conceded practically everywhere.³

FREEDOM OF COMMUNICATION BY AMBASSADOR WITH HOME STATE.

§188. The envoy must have unrestrained communication with his home state, free from any interference or espionage by the receiving state. This freedom and secrecy of communication is essential to the proper discharge of his official functions. It is customary for each state to have its own diplomatic code, and communications are translated into this code, thus supposedly preventing their being read if they should fall into the wrong hands. In many cases a messenger is employed where greater secrecy is desired, who travels with dispatches from the envoy to his home government, or vice versa. Such officials are entitled to protection and must be given full freedom of traversing the country and their dispatch boxes cannot be examined at the frontiers, without interfering with the ambassador's communication with his own government.⁴

³ See 1 Halleck, *Int. L.*, 4 ed. (1908) 385; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. V. VI. 1; 4 Moore, *Dig. of Int. L.*, (1906) 554; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 244, 245; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 370, 371; Vattel, (1758) Chitty's Trans. Book IV. §104; Woolsey, *Int. L.*, 6 ed. (1897) 140, 141.
³ 1676—English ambassador to France obtained permission from that government to include among his suite certain Frenchmen and refugees on account of their religion; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 181. Emperor Joseph IV. gave Protestants of Vienna liberty of religious devotion, and then insisted on the chapels of the foreign Protestant envoys being closed; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 245. 1678—Parliament inquired as to number of priests attached to foreign ministers in London with a view of preventing resort of English subjects to a chapel of foreign ministers; 1 Halleck, *Int. L.*, 4 ed. (1908) 385n¹.

⁴ 1835—The Minister from Salvador represented that telegraphic intercourse between Salvador and Mr. Hall, the Minister of the United States to the Central American States was supposed to be interfered with by Guatemala. The United States promptly remonstrated with that government; 4 Moore, *Dig. of Int. L.*, (1906) 701.
 1869—The United States protested against the act of the Argentine Military Commander at Asuncion, who declined to obey the order of his Government granting the safe conduct of a messenger from the commander of the U. S. S. "Wasp" to the American Minister at Paraguay, who was within the military lines of President Lopez of the Argentine Republic; 4 Moore, *Dig. of Int. L.*, (1906) 696. For a request to the Secretary of War of the United States of America that a paper from the British Ambassador be sent through the military lines to General Lee with flag of truce, see 4 Moore, *Dig. of Int. L.*, (1906) 696. For decree of Argentine

GENERAL PROVISIONS OF MUNICIPAL LAW.

§189. There are numerous provisions of the municipal law which apply to an envoy.⁵ Indeed, it does not seem possible to enumerate all the different headings and discuss whether or not they are applicable. The immunity, as we have seen, is an immunity from redress from municipal act of the government infringing on the personal status of the envoy, as representative of an independent state, and since the receiving state can always demand the recall of the envoy or dismiss him whenever he fails to comply with the general provisions of the municipal law, it seems rather beside the point to say that he is not subject to such law.⁶ He is subject to all the external factors determining the conduct of members of the state except that of the political power of the state acting through its municipal organs.

CLASSES OF ENVOYS HAVING IMMUNITY.

§190. All the four classes of envoys established by the Congress of Vienna have immunity but consuls do not.⁷ Negotiators at

Government of Jan. 24, 1900, interfering with the communication of foreign ambassadors to their home governments, and objections of the United States of America, see 4 Moore, *Dig. of Int. L.*, (1906) 553. It appears that the United States is of the opinion that the inviolability of a dispatch bearer is subject to limitations when the country is in a revolutionary state and with due regard to the safety of the state, and subject to temporary inconveniences which do not defeat the right itself; 4 Moore, *Dig. of Int. L.*, (1906) 695. See Vattel, (1758) Chitty's Trans. Book IV. §123.

⁵ Vattel, (1758) Chitty's Trans. Book IV. §93, discusses how the foreign minister is to behave, as, for instance, how an ambassador is bound to respect regulations, for instance forbidding passing in a carriage near a powder magazine, or over a bridge, or walking around and examining the fortifications of a town.

⁶ The United States envoy at Berlin submitted voluntarily to the German law relating to insurance against disability and old age of persons working in a dependent position; 4 Moore, *Dig. of Int. L.*, (1906) 672. The diplomatic coachmen's badge is used to identify the equipage as that of a foreign envoy, and it appears that the United States is of the opinion that in ordinary conditions of street travel the envoy's equipage may be expected to follow the ordinary rules of the road, the same as any private equipage, and that no special privilege will be shown such an equipage except upon occasions of great crowds or public ceremonies or large entertainment, where special facilities of the police in getting through would be of great advantage; 4 Moore, *Dig. of Int. L.*, (1906) 679.

⁷ Hall, *Int. Law*, 6 ed. (1909) 307, 308; 1 Wildman, *Int. L.*, (1849) 101.

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congresses or conferences and dispatch bearers have immunity, but commanders of armed forces, civil officers,⁸ secret diplomatic agents and commissioners from belligerent states⁹ do not ordinarily have immunity.

IMMUNITY OF ENVOY IN THIRD STATE.

§191. The envoy may be in a third state while representing his government, that is, in a state, which is neither the sending or receiving state, and which case will usually occur while he is going to or returning from the place of his mission. His immunity there is not so clear,¹⁰ and many cases have occurred where it has been denied.¹¹ It seems as if the immunity in the receiving state has first been established, and the immunity in the third state was later recognized as being important. The modern practice seems to be conforming to a grant of the immunity. In time of war a belligerent is clearly under no obligation to permit safe transport through its territory of an envoy of the enemy accredited to a third power or grant him any immunity whatever when he enters the jurisdiction after the outbreak of war. A belligerent state may grant safe conduct.

⁸ Germany in 1887, in the case of the French officer of police Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognized the rule that a safe-conduct is tacitly granted to foreign officials when they enter officially the territory of a state with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 511.

⁹ Thus, when in 1796, Messrs. Gore and Pinkney, the American Commissioners in London, under Article 7 of the Jay Treaty, claimed these privileges, Great Britain refused to concede them; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 513; 4 Moore, *Dig. of Int. L.*, (1906) 428.

¹⁰ Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. c. XVIII. V.;

Martens, *G., Law of Nations*, (1788) Cobbett's *Trans.* V. XI.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 469 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 15, 17; Vattel, (1758) Chitty's *Trans.* Book IV. §64, 65; Wheaton, *Elements*, Dana's ed. (1866) 321-323; 1 Westlake, *Int. L.*, 2 ed. (1910) 274.

¹¹ Athenians caught in Thrace and killed, envoys from the Peloponnesians on their way to Persia to form an alliance against Athens; Woolsey, *Int. L.*, 6 ed. (1897) 148; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 17. 1525—Henry II. of France, sent the Mareschal de St. Andre as ambassador to Edward VI. of England, and the Queen of Hungary, who governed the low countries, tried to seize him on his return between Dover and Calais. Peace existed at that time between France and Spain. Henry soon after complained of his grievances

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against Spain, and mentions this attempt against his ambassador as a breach of the peace, but does not consider it a violation of the law of nations; 2 Ward, *Hist.*, (Dublin, 1795) 337. Rinçon and Fregorze, envoys of Francis I. of France, passing from the Duchy of Milan, one on his way to Venice, the other to the Porte, were seized and killed, seemingly by the procurement of the government of Milan. Emperor Charles V. was indifferent; 2 Ward, *Hist.*, (Dublin, 1795) 335; Woolsey, *Int. L.*, 6 ed. (1897) 148. Wheaton, *Elements*, Dana's ed. (1866) 321, says that some writers uphold the act as not in violation of international law; contra Vattel, (1758) Chitty's *Trans. Book IV.* §§84, 85. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 216, says that they had no safe conduct, and therefore possibly subject to arrest but not execution. 1572—All Frenchmen found in England without a passport were arrested, and du Croc, the French Minister to Scotland, on his way thither, was seized, and when the French Government complained, England answered he was detained for want of a passport, with which France appeared to have been contented; 2 Ward, *Hist.*, (Dublin, 1795) 338; Woolsey, *Int. L.*, 6 ed. (1897) 148. 1573—When the Duke of Anjou (afterwards Henry III. of France) was elected King of Poland, the ambassadors who were on their way to announce his election, were refused a passport in Saxony and detained by the elector; 2 Ward, *Hist.*, (Dublin, 1795) 338; Woolsey, *Int. L.*, 6 ed. (1897) 148. 1587—Danish ambassador, on his way to the Duke of Parma, with the offer of mediation, was intercepted by Holland. Denmark avenged herself by laying an embargo on Dutch shipping in her ports; Walker, *Science, Int. L.*, (1893) 227. In 1603, Gregory Barbarigo, being sent as ambassador from Venice to Great Britain,

stopped in his passage in the State of the Grisons, the ally of Venice; and having business with the French Ambassador, he remained there for some time; but his expenses and festivities not suiting the chastened simplicity of the Grisons, they ordered him to retire; 2 Ward, *Hist.*, (Dublin, 1795) 338. In 1641, the Portuguese Ambassador to the States, passing through England, demanded audience of the King; it was granted but upon condition that it should be as an individual, not as ambassador, and consequently that he could not be allowed the usual ceremonial; 2 Ward, *Hist.*, (Dublin, 1795) 338, 339. 1703—Plot was hatched for the cutting off by French agents in Switzerland of the Imperial ambassador on his way from Savoy; Walker, *Science, Int. L.*, (1893) 227. 1717—Baron de Görtz, Ambassador of Sweden at the Court of London, was arrested by the States General on the ground that he had not presented his letter of credence. Wheaton, *Elements*, Dana's ed. (1866) 323, says that the arrest was made at the request of George I. of Great Britain against the security of whose crown he had been plotting. In 1739, Major Sinclair, sent as a messenger by the Swedish minister from Constantinople to Sweden, was killed in Silesia; Martens, G., *Law of Nations*, (1788) Cobbetts *Trans V. XI.* 5. 1744—When the French Ambassador, Mariéchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with England, at war with France, he was made a prisoner of war and sent to England; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 471; 1 Westlake, *Int. L.*, 2 ed. (1910) 274; Woolsey, *Int. L.*, 6 ed. (1897) 148. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 217, mentions a similar case, without names, as occurring in 1756. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 377n², says was a

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In Third State

case of enforcing strict right of war. Hall, *Int. Law*, 6 ed. (1909) 303, says envoy was in enemy country. 1744—English ambassador to Venice, while passing through dominions of the Emperor of Austria, was arrested with his servants by the Austrian officer in command, on the ground that Great Britain was an ally of the enemies of Austria although not actually at war, and that he had received orders to let no Englishman pass. The Englishman finally obtained his release upon conditions, and Austria compelled the officer in command to offer an apology in person to the ambassador; 1 Halleck, *Int. L.*, 4 ed. (1908) 389; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 210-211; 1763—Count Wartensleben, Minister of the States General to a part of the German Powers, was arrested at Cassel as executor of a will; Woolsey, *Int. L.*, 6 ed. (1897) 148. 1793—The plenipotentiaries from France to Switzerland and Naples were arrested while passing through Austria. In this case the Austrian Government stopped the emissaries on Lake of Chiavenna, probably because the aims of the French Revolution were inimicable to the safety of the House of Hapsburg, and the agents were sent for the purpose of spreading that infection through other countries. It is just possible, however, that the seizure was justified, that the state was preventing a neighboring state from carrying on hostile propaganda in the territory of a third power; 1 Halleck, *Int. L.*, 4 ed. (1908) 389; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 217. 1799, April 28—Three French envoys at Rastadt, in conference with envoys of minor German states, were required by the Austrians to leave the city, France being then at war with Austria. They were attacked by a squad of Austrian hussars outside the gate, two killed and a third left for dead. The Austrian

Government represented that it was a mere outrage of drunken soldiery. Investigations which were begun by Archduke Charles were stopped and never continued. The papers relating to the investigation were removed by the Austrian Government from the military archives in 1804, and have never since been discovered. Fyffe, *Modern Europe*, Vol. 1, p. 180; Woolsey, *Int. L.*, 6 ed. (1897) 146, n¹. The Ottoman Porte, in the 16th century, being at peace with Venice, sent a minister to the King of France to know of his sentiments toward his waging war against Venice. The ambassador was arrested in passing through Venice, and the remonstrances of the ambassador were not heeded by the republic, which took the ground that a sovereign power need not recognize a public minister as such unless it is to him that his credentials are addressed; 2 Ward, *Hist.*, (Dublin, 1795) 337; Woolsey, *Int. L.*, 6 ed. (1897) 148. Marquis de Monti, Ambassador from France to Poland, was arrested at Dantzic on his way back to France, said (Twiss, *L. of Nations, Peace*, 2 ed. (1884) 377, n²³) to be an instance of enforcing a strict right of war. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 472, says he took an active part in the war. The diplomatic agents of foreign powers at Frankfort-on-the-Main were allowed the same privileges on their transit as the members of the German Confederation; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 217. 1803—The Earl of Elgin, Ambassador from Great Britain to the Ottoman Porte, on his way home from Turkey, was arrested in Paris by order of the First Consul immediately upon the rupture of the Peace of Amiens. He was not released until the end of the war. Regarded as an extreme instance of the *summum jus* of a belligerent; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 377, n²³; Twiss,

IMMUNITY OF AMBASSADOR ON THE HIGH SEAS.

§192. The envoy on the high seas will be going to or returning from the exercise of his functions at some foreign court. He may be (A) traveling in time of war on (a) his own ship or (b) on a neutral ship or (c) on an enemy ship; (B) in time of peace he may be on

War, 2 ed. (1875) 95. 1854—Sou'ê, the envoy of the United States of America at Madrid, who landed at Calais, intending to return to Madrid via Paris, was provisionally stopped at Calais for the purpose of ascertaining whether he intended to make a stay in Paris, which the French Government wanted to prevent, because he was a French refugee naturalized in America and was reported to have made speeches against the Emperor Napoleon. Sou'ê at once left Calais, and the French Government declared, during the correspondence with the United States in the matter, that there was no objection to Sou'ê's traversing France on his way to Madrid, but they would not allow him to make a sojourn in Paris or anywhere else in France; Hall, *Int. Law*, 6 ed. (1909) 301, 302; Hershey, *Int. L.*, (1912) 279n²³; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 470; 4 Moore, *Dig. of Int. L.*, (1906) 557; 1 Westlake, *Int. L.*, 2 ed. (1910) 274. United States of America accords diplomatic privileges to foreign diplomats passing through the country; 4 Moore, *Dig. of Int. L.*, (1906) 557. Envoy of a neutral caught in belligerent territory occupied by the military forces of the enemy or in a belligerent city.—The principal case which occurred concerning this problem is that of Mr. Washburne, ambassador of the United States in Paris during the siege of that town in 1870 by the Germans, who claimed the privilege of sending a messenger to London with despatches in a sealed bag through the German lines. But the Germans refused to permit the ambassadors to

communicate with their home governments except under condition that the dispatch bags be opened by the German officers outside the city; and they adhered to that decision although the Government of the United States protested. See Hall, *Int. Law*, 6 ed. (1909) 304; Hershey, *Int. L.*, (1912) 280; 4 Moore, *Dig. of Int. L.*, (1906) 696-701; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 471; 2 Oppenheim, *Int. L.*, 2 ed. (1912) 194. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 275, says the Germans refused the transmission of dispatches of all envoys except the minister of the United States, to whom the protection of Prussian subjects at Paris had been entrusted, and that the United States did not seem to differ much from the view taken by Germany. 1866-67—Charles A. Washburn, United States minister to Paraguay was hindered and delayed on his return to the United States of America by the military forces of the Argentine Republic and Brazil then at war with Paraguay. The United States of America protested and the interference was withdrawn; 4 Moore, *Dig. of Int. L.*, (1906) 559 et seq. 1918, April, during the war of the German Aggression (1914-1918) the Germans bombarded Paris with a long-range gun, and, during a bombardment on Good Friday, killed the counsellor of the Swiss Legation in Paris, Switzerland being neutral. It appears by the public prints that the Emperor of Germany sent a personal letter to the President of Switzerland apologizing for the killing.

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When Beginning

(a) his own ship, (b) a ship of the receiving state or (c) a ship of a third country. Most of the instances which have occurred come under the first heading. In time of peace, in modern times, there is ordinarily no controversy over the envoy traveling from one state to another. An ambassador traveling on the high sea is outside the jurisdiction of his own country and not within the jurisdiction of any other country. His immunity, therefore, depends on the ship on which he is traveling. If the ambassador of one belligerent is traveling on a neutral ship, he is protected by the neutrality of the ship and may not be captured by the warship of the other belligerent.¹²

FROM WHAT TIME IMMUNITY BEGINS.

§193. There has been a difference of opinion¹³ as to the time from which immunity begins, whether from the time the ambassador first

¹² 1861, Nov. 8—During the Civil War in the United States of America, the Confederate commissioners, Mason and Slidell, and their secretaries, were taken from the British ship "Trent" on the high sea by a man-of-war of the United States Federal Government. On protest of Great Britain, the United States of America surrendered the captives. A strong note of protest was also addressed to the United States of America by Austria, France and Prussia. For text of the note, see 10 *American J. Int. L., Supp.* 67. For a discussion see 2 Halleck, *Int. L.*, 4 ed. (1908) 325 et seq.; 7 Moore, *Dig. of Int. L.*, (1906) 768 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 644; Walker, *Science, Int. L.*, (1893) 131 et seq. "The Trent Affair," (1896) James A. Woodburn. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 169, says three questions arose: (1) are dispatches of the envoys exempt as not being of the nature of contraband, (2) are envoys themselves exempt as such, (3) was it a violation of the jurisdiction of a neutral vessel; and says that different grounds were assigned by the various parties, and, on p. 175, that on the whole, the

case might be considered as establishing the proposition that the ambassador of a belligerent cannot be taken from a neutral ship on the high seas. "In 1780 private negotiations were opened between persons in Holland and in the then North American colonies of Great Britain on the subject of a free commercial intercourse between those countries. Mr. Henry Laurens was sent as Minister Plenipotentiary to Holland on board an American packet, with important papers showing a plan of alliance between those countries. The packet was stopped, and Laurens and the papers brought to England, where he was charged with high treason. (Knight's *Hist. of England*, vol. v. p. 437.)"; 2 Halleck, *Int. L.*, 4 ed. (1908) 323,n; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 173, 174. War of the German Aggression (1914-18). Great Britain granted a safe conduct for German and Austrian ambassadors from the United States of America to their respective countries upon war breaking out between the United States and Germany and Austria.

¹³ Hershey, *Int. L.*, (1912) 279, n. 20.

enters the country or only from the time that he is accorded an audience and assumes his official status as the ambassador, and when he leaves, whether the immunity extends to the time of his departure from the country or ends when he has ceased to act as ambassador. It seems quite clear that the reason for the immunity exists while the ambassador is in the country, even though for part of the time he is not enjoying his full status as an ambassador. It has been suggested that the envoy is only entitled to immunity as a matter of strict law, after his public reception,¹⁴ but that he is customarily granted these immunities from the time of his entry into the country, but the authorities are not agreed upon the point, and it is difficult to find in the practice a sound basis for a principle of law since the diplomatic relation is mutual and full immunity cannot be enforced by the sending state alone. Upon this it is to be observed that the immunity is granted by the receiving state alone, and the sending state has nothing whatever to do with it, and that the immunity is granted by reason of the obligation of the international factors of conduct, and since it is designed to expedite the exercise of the functions of an ambassador, the question of public audience has nothing whatever to do with it.¹⁵

When a member of the state was received, the question was raised as to his immunity, it being thought that he could not claim full immunity because subject to the jurisdiction of his own state as a member.¹ There would be a conflict of jurisdiction here, and the question would arise as to how far the jurisdiction was divested by the member assuming the office of an ambassador from a foreign state. If such an ambassador is accepted, it may be argued that the

¹⁴ Hershey, *Int. L.*, (1912) 279, n. 20.

¹⁵ 1818—A Mr. Sarmiento, an envoy to the United States (it does not appear from what country) was arrested for a judgment debt to the United States, contracted prior to his appointment, and the Attorney General gave his opinion that his appointment imposed on the President no obligation at all to discharge from the previous judgment; 4 Moore, *Dig. of Int. L.*, (1906) 654, 655. 1864—Dr. Segur, Minister from Salvador, after his recall at the request of the United States and termination of

his diplomatic functions, was imprisoned at Fort Lafayette on the charge of violation of the neutrality laws of the United States; 4 Moore, *Dig. of Int. L.*, (1906) 667. 1917—When the German Ambassador was handed his passports by the United States Government he immediately ceased to have any official status after the passports were handed, but he was carefully protected in his person until he had left the country.

¹ Woolsey, *Int. L.*, 6 ed. (1897) 136.

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Waiver of Immunity

acceptance constituted an implied assent to the divesting of jurisdiction.²

WAIVER OF IMMUNITY.

§194. The immunity may be waived by the sending state, and where express, there is no difficulty.³ The only question is whether the immunity may be waived by the envoy, and what amounts to an implied waiver. There is a difference of opinion among the writers as to whether the consent of the sending state is necessary to a waiver.⁴ It seems clear, however, that so far as its interest in the envoy is concerned, the latter cannot waive. Where the immunity is for the benefit of the envoy, as in the case of wife, family and domestic servants, there seems to be no reason for the sending

² See *Macartney, vs. Garbutt*, 1890—L.R. 24, Q.B. 368. British subject, secretary of Chinese Legation and received by Great Britain without express condition that he should be subject to British law, has immunity. For discussion see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 450. As to immunity of ambassador on homeward journey when reception has been refused, see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 451n². Twiss, *L. of Nations, Peace*, 2 ed. (1884) 366, says the right of personal inviolability attaches to the envoy from the moment of entering the state to which he is accredited, if notice of his mission has been previously communicated to it, to time of quitting the territory, although war has broken out. 1917, Count Luxberg, German Minister to the Argentine Republic, having been handed his passports, deviated from his course on his journey home, and hid in Uruguay, whereupon he was arrested. The opinion has been expressed that if he remains in the country after a sufficient time for removal has elapsed, his immunity ceases. Upon the death of an ambassador, his widow, family and domestics continue in the enjoyment of the same immunity, for a

limited period. See Wheaton, *Elements*, Dana's ed. (1866) 327.

³ 1909—Wilhelm Beckert, the Chancellor of the German Legation in Santiago de Chile, murdered the porter of the legation, a Chilean subject, and then set fire to the chancery in order to conceal his embezzlements of money belonging to the legation. The German Government consented to his being prosecuted in Chile; he was tried, found guilty, and executed at Santiago on July 5, 1910; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 474.

⁴ For reference to differences of opinion as to whether consent of sending state is necessary to waiver, see Hershey, *Int. L.*, (1912) 289n⁴; Vattel, (1758) Chitty's *Trans.* Book IV. §111. Hall, *Int. Law*, 6 ed. (1909) 173n¹, says it appears to be no concern of the local court whether the waiver is by consent of the sending state or not. Phillimore, *Int. L.*, 3 ed. (1879–1888) Vol. 2, 188, 189, points out that an ambassador cannot himself waive his privilege, as on the principle of the Roman law the immunity is not personal but incident to the office for the honor and dignity and welfare of the state they represent, and indeed of general benefit to the entire community of nations.

Immunity of Envoy

§194

state to be consulted.⁵ A difficulty arises where the ambassador engages in trade or transactions outside the discharge of his diplomatic functions, and as to which there is a difference of opinion in practice as to whether there is an implied waiver of his immunity.⁶ It seems clear that if the sending state is to be consulted, there is no waiver by the mere engaging in business, and, as it has been suggested, the possible inconveniences and political misunderstandings incident to the attempt in such cases to enforce the municipal law against the envoy are a greater evil than would arise from occasional instances of an envoy escaping the processes of the court.**

⁵ Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 226, says the immunity to the suite is on account of the ambassador and may, therefore, be waived by him except in the case of officials appointed by the head of the state himself. When the Congress was held at Nimeguen, the assemblage of so many privileged persons as composed the trains of the ambassadors being likely to prove detrimental to the peace of the city, the ambassadors agreed that they should waive their right to protect their servants, and the magistracy of the town was allowed, by consent, to do justice among them; 2 Ward, *Hist.*, (Dublin, 1795) 332. Under Statute of Anne, the privilege of exemption from being sued possessed by the servant of an ambassador is lost by the circumstance of trading; Hall, *Int. Law*, 6 ed. (1909) 177; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 465, n°.

⁶ 1763—The Ambassador of Holland at the Court of the Landgrave of Hesse-Cassel was accused of mal-administration of a testamentary trust. The Government of Cassel called upon him to render an account, which he refused to do, whereupon he was arrested with a view to obtaining from him the necessary documents connected with the trust. But the Landgrave was obliged to send a special embassy to Holland to make apology and reparation for this infraction of international law; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 202. 1720—

Envoy of the Duke of Holstein to Holland was sued in Holland for debt contracted in the course of trade, and judgment was rendered against him and execution issued for property within the jurisdiction against movables and things belonging to him as an ambassador; 1 Halleck, *Int. L.*, 4 ed. (1908) 368, 369; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 223. Embarking in commerce is a waiver of immunity, but the envoy may be indirectly compelled, by seizure of the effects belonging to the commerce, to plead in his own defense; Vattel, (1758) Chitty's *Trans. Book IV.* §114. The notion has been advanced that the immunity cannot be waived at all, and that a judgment may be rendered against the ambassador personally, but no execution may issue against him or against the property entitled to immunity by international law; 1 Halleck, *Int. L.*, 4 ed. (1908) 365 et seq.

** Manning, *Int. L.*, 2 ed. Amos (1875) 111, 112, says that as to transactions in which envoy engages outside his diplomatic function, as engaging in trade or becoming a plaintiff, there is no real waiver of privileges, as the possible inconveniences and political misunderstandings incident to an attempt in such case to subject him to the power of the state are a greater evil than the occasional impotency of the courts.

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Envoy as Complainant

DAMAGE TO INTEREST OF THE ENVOY.

§195. The interest of the envoy apart from the interest of the sending state in him, may be damaged by acts done within the jurisdiction, which will generally be by act of an individual, as by assault and battery on the person of the envoy, robbing him in the highway, or otherwise offering him personal injury or violation. The property of the envoy may be damaged. The receiving state, so far as it is bound by international law to protect his interest and to the extent to which it conforms to that obligation, will restrain such conduct by persons of the state by appropriate municipal law.⁷

ENVOY AS COMPLAINANT.

§196. The envoy cannot appear as plaintiff or prosecutor against an individual damaging his interest without, to a certain extent, compromising the dignity of the state, where he will have to appear in court, give testimony, and perhaps swear out a preliminary warrant.⁸ The general practice is for the receiving state to proceed against such wrongdoer on behalf of the envoy. Some difficulty

⁷ 1639 (about), Grotius, Ambassador of Sweden to the court of Louis XIII, on his return from an audience with the King, while passing through a village, was fired at by a crowd who had assembled to witness an execution, the report having gone around that the occupants of the coach were friends of the prisoners and were come to rescue them, one of the mounted servants of the ambassador having struck the people with his whip in order to make the mob give way for the coach. The King, upon learning of the affair, apologized, and a number of the inhabitants of the village were arrested, tried and convicted, but Grotius obtained a pardon for them. Grotius, by Vreeland (1917), 217, 218. *Respublica v. De Longchamps*, 1 Dall. 111 (1784). Defendant was convicted of an assault on the Secretary of the French Legation (a) within the mansion (house) of the minister, (b) on the public street. Conviction sustained under law of nations, part of the law of Pennsylvania (no statute), and demand of French

Minister that defendant, who was a Frenchman, be delivered up and sent to France for punishment, refused, and sentenced to imprisonment and fine imposed. *United States v. Ortega*, 11 Wheat. 467 (1826), indictment under act of 1790, chapter 36, for infracting the law of nations by offering violence to the charge d'affaires of Spain. Convicted. Moved in arrest of judgment that the cause was one affecting an ambassador or other public minister, and therefore not within the jurisdiction of United States Circuit Court but within the sole jurisdiction of the United States Supreme Court within the words of the Constitution. Motion dismissed. The case not within the meaning of the Constitution, as it affects the United States of America and the individual convicted.

⁸ Notice also that the envoy, if insulted or wronged, cannot appear as a common person demanding satisfaction in a court of justice. "He has a right to demand the state in which he is residing prosecute the wrongdoer as a

arises, however, in a state where the municipal law requires the prosecutor to institute the proceedings and appear against the accused, and excludes any testimony against him, unless it is given in open court on his trial.⁹

public criminal;" 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 188; Vattel, (1758) Chitty's *Trans. Book IV. §111.* 1627—Phillip Weiseman, a German, made a bargain to defray the expenses of the Ambassador of Denmark at a certain rate from Paris to London, and upon the latter's arrival at London, made an unreasonable demand, whereupon the ambassador complained to the Lord Chamberlain, who acquainting the King, an order was made for the Lord President of the Council, the Lord Chamberlain, and the Vice-Chamberlain, to hear and determine the business. This body found that the said Phillip had received more monies than was agreed upon, and had, without reason, made the demand upon the ambassador and had maliciously and impudently blazed abroad words and writings without having regard to the honor of the person whom he presents, etc. He was ordered committed until he gave satisfaction to the ambassador; 2 Ward, *Hist.*, (Dublin, 1795) 302.

⁹ In the United States there is a difficulty in the application of this principle owing to the constitutional rule requiring that evidence be given against a criminal in open court, and therefore if, in any case, the envoy is a necessary witness, he must appear and give such testimony, otherwise the prosecution will fail. Where a foreign attaché institutes criminal proceedings in the United States Courts against a local officer for violation of his diplomatic privilege and claims immunity from the requirement of personal attendance and testimony, the Department of State will refrain from interfering and leave it with the court having

jurisdiction to decide whether the attaché should be required to attend; 4 Moore, *Dig. of Int. L.*, (1906) 642 et seq. The evidence, of course, might be sufficient to convict without calling the prosecution. The language is ambiguous. 1793—The Minister Plenipotentiary of France complained to the United States of some libellous publications against him by the Chief Justice of the United States and a United States Senator. The President indicated that the minister should be protected; 4 Moore, *Dig. of Int. L.*, (1906) 628. As to the trial of William Cobbett for libel on the Spanish Minister, see 4 Moore, *Dig. of Int. L.*, (1906) 629. 1802—A mob in the City of Philadelphia tore down the flag of the Spanish Minister; 4 Moore, *Dig. of Int. L.*, (1906) 627. 1810—The charge d'affaires of Russia gave a party at his house in Philadelphia, and a mob outside took offense at a transparent painting in his window and endeavored to destroy it. It appears that the persons implicated were prosecuted before the municipal tribunal; 4 Moore, *Dig. of Int. L.*, (1906) 627. 1841—An assault was committed in the City of New York on a son of General Alvear, the Argentine Minister to the United States, the son being also Secretary of the Legation. The United States apologized and stated that the proper authorities would be instructed to proceed against the assailants; 4 Moore, *Dig. of Int. L.*, (1906) 623. 1852—Count Sartiges, the French Minister to the United States, received a letter challenging him to fight a duel, and the challenger upon finding the challenge unaccepted, indicated that he would assault the

CONTROVERSIES BETWEEN ENVOYS.

§197. Controversies may arise between two or more envoys in any country. Such instances are rare, and when they occur are inevitably a source of embarrassment to the receiving state because the interest of two fully equal independent states in their respective envoys is concerned and any interference by the receiving state may involve a discrimination between the two which may give offense.¹⁰

minister. United States authorities took steps to hold him in bail to keep the peace; 4 Moore, Dig. of Int. L., (1906) 624. 1852—Baron von Gerolt, Prussian Minister to the United States, complained of violence, threatened or committed, on him or his household by a German named Du Pilessis. The Attorney General of the United States stated that a prosecution must be instituted before a proper officer on oath, and that if the envoy was the only person who was a witness, and therefore the only one capable of testifying, there seemed to be no reason why he should refrain from voluntarily offering his testimony in the matter; 4 Moore, Dig. of Int. L., (1906) 624. 1883—Upon complaint of the Haitian Minister of the failure of local authorities to institute proceedings against a person who was alleged to have assaulted his son, he was advised that such proceedings could not be instituted except upon complaint of the person assaulted or of a witness to the assault; 4 Moore, Dig. of Int. L., (1906) 625. 1887—The house of the Chilean Minister at Washington was robbed. The minister expressed his appreciation of the action of the police in promptly arresting the offender. The Department of State expressed to the minister its hope that, in order to prevent a miscarriage of justice, the minister and the members of his family would offer themselves as witnesses; 4 Moore, Dig. of Int. L., (1906) 645.

¹⁰ 1651—Spanish Ambassador at Holland complained that the French

Ambassador had intercepted his dispatches and opened his letters. The States General refused to take any cognizance of the matter as subject only to inquiry of French and Spanish kings; 1 Wildman, Int. L., (1849) 112. 1826—A controversy arose at Washington between two diplomatic representatives of Portugal, different appointments having been made owing to change in the government at home. A controversy arose between these gentlemen, and one demanded of the other the surrender of the archives of the Portuguese Legation, and, upon refusal, had him arrested and confined for refusal to give bail. The arrested envoy applied to the Department of State for a certificate of his recognition by the President as *charge d'affaires* of Portugal. The Attorney General of the United States gave an opinion that the seizure of power by the new government at Portugal did not *ipso facto* extinguish the letter of credence of the latter government's envoy; that in order to produce this result, there must be an appointment by the new government and a recognition of the authority of the new government by the United States. This opinion was submitted to the court, which discharged the envoy from the process on the ground (1) that an outgoing minister was privileged from suit, (2) that the opinion of the Attorney General prepared for the Department of State should be received as the sense of the government on the subject; 4 Moore, Dig. of Int. L., (1906) 664 et seq. 1918, June 1—As the result of a

FUNCTIONS OF AN AMBASSADOR.

§198. The function of an ambassador is to negotiate and to report to his home country on all matters of interest arising in the country to which he is accredited.¹¹ He also has frequently imposed upon him certain duties of registration of births, marriages and death, and of granting passports and authentication of certain documents. He is also expected to look after the interests of the members of his own state. The extent to which he can exercise the functions other than those of direct negotiation is obviously limited by the municipal law of the country to which he is sent.¹²

conflict for possession of the legation premises at Berne, Switzerland, between the former diplomatic representatives of Russia and a Soviet delegation that recently was admitted to Switzerland, the Swiss authorities sealed up the legation quarters, excluding both parties. The Bolshevik delegation arrived in Berne to establish diplomatic relations between Switzerland and Russia. Felix Calonder, President of the republic, informed them that Switzerland was giving the Soviet Government only semiofficial recognition. The delegation appeared at the Russian Legation to take possession of the office, but found the former minister and his staff determined not to give up the place. The government decided later to close the premise.

¹¹ Hall, *Int. Law*, 6 ed. (1909) 184n¹; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 453, 454; 4 Moore, *Dig. of Int. L.*, (1906) 565-576.

¹² The functions of an envoy are:

(A) Direct internal business of the mission—

- (1) Custody of archives,
- (2) Diplomatic correspondence,
- (3) Record of work of legation,
- (4) Exercise of measure of jurisdiction over household.

(B) Conduct of negotiations with receiving state—

- (1) Verbal communications,
- (2) Formal communications,
- (3) Maintenance of diplomatic

privileges and immunities,

- (4) Action to protect interests of state and particularly treaty rights.

(C) Relation to citizens of his own state—

- (1) Measure of protection to them,
- (2) Issue and visé of passports and, in some countries, issue of certificates of nationality and travel certificates,
- (3) In matters of extradition,—
Presentation of requisition for extradition of member of his own state from receiving state.

Certification of papers submitted in the matter of requisition by receiving state upon sending state.

- (4) Sometimes performing notarial functions,
- (5) Exercise of reasonable courtesy in treatment of his fellow citizens.

All functions vary with local law.

(D) Making of reports of his own government—

Keeping them informed upon
Views and policy of the state to which he is accredited.

Such facts as to events, commerce, discoveries as may seem desirable; Wilson & Tucker, *Int. L.*, (1901) 170, 172.

§199

Termination of Mission

TERMINATION OF THE MISSION.

§199. The mission begins by act of the state in sending and another state in receiving an ambassador and cannot begin in any other way. No individual can, of his own motion, constitute himself an ambassador of a state, and no state can enter into diplomatic relations with another state without the formalities of sending an ambassador who is duly received, as has already been described. International intercourse, as it were, must flow in certain prescribed formal channels. The mission may, however, terminate in several ways, which can only be by the act of the sending or receiving state or the occurrence of some extraneous fact necessarily interrupting the intercourse, as for instance, the death of the ambassador. The writers, however, generally fail to accurately apprehend¹³ this point and refer to facts as terminating the mission which do not necessarily have that effect of themselves; as, for instance, war, which we have already pointed out, results in the belligerent states terminating diplomatic relations, but does not, of itself, terminate those relations. In all these cases, the mission is terminated by act of the sending or receiving state taken in consequence of the facts referred to. Some of the views of the writers are collected in the note.¹⁴ These arrangements of the cause of termination of the mission are, as usual, illogical and confusing. We have appended in the note a tabular statement which is believed to be a more accurate representation of the facts

¹³ See Hall, *Int. Law*, 6ed. (1909) 297; 1 Halleck, *Int. L.*, 4 ed (1908) 390-395; 4 Moore, *Dig. of Int. L.*, (1906) 470 et seq.; Vattel, (1758) Chitty's *Trans.* Book IV. §125.

¹⁴ Mission may terminate in various ways:

- (A) Death of diplomat,
- (B) In ordinary course of events by
 - (1) Expiration of period for which powers were given,
 - (2) Fulfillment of purpose of mission sent on special errand,
 - (3) Change of grade of diplomat,
 - (4) Death or dethronement of the sovereign to whom accredited except in case of republican forms of government,
 - (5) Change in government of sending state.

- (C) Mission may be interrupted or broken off by

- (1) Strained relations
 - Between states themselves.
 - Between the diplomatic agents and receiving state.
 - (2) Declaration of war immediately terminates diplomatic relations,
 - (3) Diplomatic relations broken off by personal departure of the agent for stated cause,
 - (4) Friction between two states.
- Wilson & Tucker, *Int. L.*, (1901) 172, 173. "A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of such letters of credence as were given to an envoy for a specific time

Termination of Mission

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only; recall of the envoy by the sending state; his promotion to a higher class; the delivery of passports to him by the receiving state; request of the envoy for his passports on account of ill-treatment; war between the sending and the receiving state; constitutional changes in the headship of the sending or receiving state; revolutionary change of government of the sending or receiving state; extinction of the sending or receiving state; and lastly, death of the envoy;" 1 Oppenheim, Int. L., 2 ed. (1912) 476. Phillimore, Int. L., 3 ed. (1879-1888) Vol. 2, 262, says mission may be:

1—altered in its rank or character.

(a) grade of embassy changed.

2—suspended

death of sovereign.

3—is ended by—

(a) lapse of a particular period, as in the case of an ambassador appointed *ad interim* when the regular ambassador returns to his post.

(b) accomplishment of the particular object of the mission;

(c) by death, abdication or dethronement of the sovereign accrediting the minister, or death of the sovereign to which he is accredited;

(d) by formal declaration of minister that his mission can be considered as closed;

(e) by act of court to which he is accredited;

(f) by voluntary resignation of office by envoy;

(g) by recall by his own government.

The functions of an ambassador cease by the death of either of the sovereigns by or to whom he is accredited, but his privilege is not suspended while expecting new credentials or waiting to be recalled; 1 Wildman, Int. L., (1849) 120. The mission of a foreign minister

resident at a foreign court, or at a congress of ambassadors, may terminate during his life in one of the following modes:

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases a formal recall is unnecessary.

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or, where the mission is special, and the object of the negotiation is attained or has failed.

3. By the recall of the minister.

4. By the decease or abdication of his own sovereign, or the sovereign to whom he is accredited. In either of these cases, it is necessary that his letters of credence should be renewed; which, in the former instance, is sometimes done in the letter of notification written by the successor of the deceased sovereign to the prince at whose court the minister resides. In the latter case, he is provided with new letters of credence; but where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *sub spe rati*.

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation assumes of himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct or the measures of his government, the court at which he resides thinks fit to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister. Wheaton, Elements, Dana's ed. (1866) 325, 326.

§200

Language

of the case.¹⁵ The universal custom among autocracies was to consider that a change in the head of a state, as the death or dethronement of a monarch, terminated the formal intercourse existing between the states, and necessitated new letters to the various diplomatic envoys representing that state at other capitals and the envoys of other states at its capital.¹ It is not customary, however, to consider the election of a new head of a republic as having any effect upon the intercourse between it and foreign states.²

LANGUAGE.

§200. The diversity of tongues spoken by the people of the various independent states of the world makes international communication a matter of some difficulty.³ While the Latin tongue was the exclusive medium of communication among educated men, it was employed in all international communications and treaties.⁴ During the preponderance of Spain in the fifteenth century, the Castilian tongue was generally employed. Since the reign of Louis XIV, French has been used, but under protest by other nations. The usual practice

¹⁵ A mission may be terminated by,
 Act of sending state:
 Recall of envoy,
 Change in grade,
 Ending of period, if any, prescribed
 in letter of appointment.
 Act of receiving state:
 Dismissal of envoy,
 Request for recall.
 Change in international status of sending
 or receiving state:
 Either state disappearing from inter-
 national horizon.
 Change in government:
 Disappearance of government as by
 revolution or anarchy.
 Change in head of state:
 Monarchies:
 Death, abdication or dethrone-
 ment of the prince.
 Republics:
 Election of new president.
 Death of envoy:
 Act of envoy: |
 Departure or ceasing to discharge
 diplomatic functions.

Accomplishment of object for which
 appointment was made.

¹ Great Britain dismissed the French Ambassador on death of Louis XVI. of France in 1793. See note of dismissal, 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 320. This custom appears to obtain even in modern times. Jan. 25, 1917, upon the accession of Emperor Charles of Austria-Hungary, the American Ambassador presented his new credentials at a public audience carried out with full state ceremony.

² Hall, *Int. Law*, 6 ed. (1909) 297; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. V. X. 1; 4 Moore Dig. of *Int. L.*, (1906) 462; Wheaton, *Elements*, Dana's ed. (1866) 326.

³ For discussion of this see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 65-67; Wheaton, *Elements*, Dana's ed. (1866) 235; Zouche, L. of Nations (1650), Carnegie ed., Part I. IV. 5.

⁴ See §341, ante, on treaties.

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in modern times, where states use different tongues, is for the state sending the communication to append a translation as a matter of reciprocal comity.⁵

CONGRESSES AND INTERNATIONAL CONFERENCES.

§201. Congresses⁶ and international conferences are of frequent occurrence, and are composed of representatives of the various states taking part in the congress or the conference. The representatives are not ambassadors or envoys of the same character as those sent directly from one state to the other, although they represent the dignity and honor of the sending state accredited to any other one or more particular states. Such envoys, however, have the same immunity as that possessed by ordinary envoys.⁷

SUMMARY.

§202. Intercourse between independent states is the fundamental fact of international life. Indeed it is not possible to conceive of any international relations existing without it.¹ The primary fact in intercourse is recognition of some kind.² Independent states are compelled to have intercourse with each other primarily by self-interest, and no civilized state can, without serious jeopardy to its own interests, abstain from participation in international intercourse with the other independent states of the world. The gregarious instinct of man extends to and permeates the independent state of

⁵ 1790—Emperor of Austria, Leopold II. complained to Louis XVI. that correspondence of latter was in French instead of in Latin. By 120th article of Final Act of Congress of Vienna in 1815, it was stipulated that French should be exclusively employed in copies of that treaty. Ottoman Porte regards no treaty as binding unless in Turkish. European powers have avoided what might be thought a derogatory concession to this whim by having their treaties with Turkey written in divers languages; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 66, 67. The peace treaty of Versailles of June 28, 1919, concluding the war of the German Aggression, 1914-1918, was drawn up in the English and the French

tongues. The United States uses the English language in all written communications to foreign powers. In countries in the East and urgent cases in other countries the communication may be accompanied by a translation into the language of the country but in any event the English text is to be regarded as the standard; 4 Moore, *Dig. of Int. L.*, (1906) 704.

⁶ "A military Congress is where princes or the Generals of a war meet in conference or in battle." They meet in conference in hope of settlement of the dispute; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 1.

⁷ Hershey, *Int. L.*, (1912) 308 et seq.

¹ See §130, ante.

² See §131, ante.

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Summary

which he is a part. The so-called right of a state to intercourse is only a power to have intercourse, the full exercise of which is impelled by the self-interest of the state and the facts of international life, and is not restrained by any factors of international conduct. Intercourse is purely voluntary and there is no occasion to resort to any external factor determining the conduct of independent states as every such state will participate in intercourse without any such pressure. There is therefore no obligation to maintain intercourse imposed by any external international factor of conduct, but a very strong obligation imposed by self-interest, necessities of commerce and civilization.³

Intercourse between independent states is hostile or pacific, and in either case may be: (A) personal, between the heads of the state; (B) corporate, between the governments; (C) between members of the different states in their individual capacity; (D) between an independent state and an individual, and the latter may be a member of the state in question or member of another state. We may also distinguish the intercourse and the means of intercourse.

Our attention in this chapter will be confined to the means of pacific intercourse between independent states in their corporate capacity.⁴ Personal intercourse between monarchs during the existence of personal government was the principal instance of intercourse which occurred, and such intercourse, whether hostile or pacific, was carried on for the personal advantage of the monarch, as the state and the people were regarded as his property to do with as he pleased.⁵ The growth of commerce, increase in civilization and education, and the participation of the people in the affairs of the government, altered the character of international intercourse so that today the personal affairs of the head of the state are of no practical importance, and the only intercourse requiring attention is that between independent states in their public capacity on behalf of or in the interest of the individual members of the state.⁶

Independent states confine their intercourse to other independent states and the dependent states having the international function of intercourse.⁷ An independent state cannot consistently with its dignity, independence and membership in the high and exclusive community of the international world, condescend to intercourse with individuals or a state subject wholly to the power of another state.

³ See §133, ante.

⁶ See §135, ante.

⁴ See §133, ante.

⁷ See §136, ante.

⁵ See §134, ante.

An independent state may, if it sees fit, carry on such intercourse, and the question whether it does or not is a matter entirely in its own discretion and not the concern of any other state.

Independence is the sole test of capacity to have international intercourse.⁸ While the government of an independent state is paralyzed or disorganized, there is, for the time being, no organ by which the state can participate in international intercourse. Such a condition is only temporary and of no moment in international law, although frequently causing difficulties of fact at the time to other independent states of the world.⁹

Intercourse with states not members of the family of nations,¹⁰ and with belligerents,¹¹ lies entirely in the discretion of the state concerned and is a matter solely of political expediency. In the case of a belligerent state, the intercourse is usually carried on through agents not having diplomatic immunity. In the case of a dependent state,¹² the intercourse will depend on how far the provisions of the municipal law permit the dependent state to exercise such international functions.

Catholic powers only have participated in intercourse with the Holy See since the loss of the Pope's temporal power in 1870.¹³

The organ of the state for international intercourse is its government,¹⁴ the form of which to a certain extent affects its manner of participating in international intercourse, and which acts through its various departments or officers, as to which we may distinguish the head of state, the foreign office and envoys. The importance of the head of the state has diminished with the rise of democracy and limited governments.¹⁵ The head of the state is the chief executive, he represents the government in its international relations, conducts intercourse and appoints envoys, and his functions and power are prescribed by municipal law.¹ He has no position in international life except in his official status as such head, and must be recognized as such by the other independent states of the world.² This was a frequent cause of difficulty among personal governments, but in modern times among limited governments the head is determined by municipal law and his recognition as such is always a matter of course. Among monarchs the question as to the immunity

⁸ See §137, ante.

⁹ See §138, ante.

¹⁰ See §139, ante.

¹¹ See §141, ante.

¹² See §140, ante.

¹³ See §142, ante.

¹⁴ See §143, ante.

¹⁵ See §144, ante.

¹ See §147, ante.

² See §146, ante.

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of the head when outside the jurisdiction was frequently a cause of controversy as these potentates were frequently traveling into each other's dominion and expected to carry with them their sacred, exalted and superior character as above the common run of men.³

In medieval times the monarch had little security when removed from the protection of his own armed retainers, and many instances occurred where unprotected, traveling or shipwrecked monarchs were seized and held for ransom, released upon terms, or sometimes put to death. The institution of chivalry, civilization, and inter-marriage softened the relations between the potentates of Europe. They came to form an exclusive caste, which evolved an elaborate etiquette and manners, and the various monarchs ceded privileges to each other while traveling which were far more extensive than in modern times. Various theories have been advanced to explain these immunities, but none of them seem to adequately meet the situation. The privileges of self-jurisdiction were frequently exercised, and persons were tried and sometimes condemned to death by a traveling potentate. This practice is now obsolete, and in the only case which has been found of an attempt to exercise it in the 19th century the privilege was denied by the state in whose jurisdiction the potentate in question was.

A monarch may hold property in a foreign country by a private title known to the municipal law, and when he does so his title is subject to all the provisions of that law. It is generally the practice to consider that a foreign potentate is not liable to be sued in a municipal court without his consent. And this privilege of a monarch is transferred in democracies to the government, and ordinarily does not pertain to the chief executive. This privilege was conferred probably out of courtesy in the beginning, and in order that these monarchs might assist each other in evading the payment of obligations which they did not care to assume. In modern times, the state ordinarily cannot be sued in its own courts without its consent, and the extension of such privilege to foreign states in the municipal courts is a survival of the former practice as to monarchs.⁴ The head of a republic has no personal sanctity and rarely ventures outside the jurisdiction, and, when he does, travels as an inoffensive business man, not attended by a drunken and swashbuckling retinue, assaulting the innocent people of the community, and consequently he is not as likely to come into conflict with the municipal law of the state.⁵

³ See §148, ante.

⁵ See §150 ante.

⁴ See §149, ante.

The heads of state do not usually negotiate directly and intercourse is carried on through that department of the government known in international law as the Foreign Office, and having different designations in different countries.⁶ The principal and most important officer in the negotiation is the envoy, as to whom most of the discussion relates. This discussion, furthermore, is necessary not because of his agency in carrying on intercourse between the states, which is simple enough, but because he is sent into the jurisdiction of another country and occupies in that jurisdiction a peculiar position as the representative of the dignity, honor and independence of his own state.⁷

The word "legation" describes the official representation of one country in another, and a notion was advanced of a right of legation, which is only another way of looking at the parties participating in international intercourse. The sending and reception of an envoy is the primary fact in international intercourse, consequently the question whether two or more states are going to have intercourse is generally determined by the refusing or reception of an envoy. Since, however, intercourse may be in fact carried on without an envoy, it is putting the cart before the horse to speak of a right of legation as being the determining factor. If the state is in a position to participate in international intercourse, the sending and reception of the envoy is a subordinate act. The fact, however, that the question of sending and receiving of the envoy was the first question raised misled the writers into emphasizing the fact of such sending, and overlooking the circumstance that it was only a subordinate part of the general intercourse between the states. The word "right" furthermore is misused in this notion in place of the word "power."⁸

Envoys are ceremonial or political, special or permanent, ordinary or extraordinary,⁹ and have been divided by treaty agreement between the several powers into certain ranks. Prior to 1815 there were no ranks of envoys, and many disputes over the precedence were constantly occurring. The agreement made by the great powers of Europe, which has been followed since except by the Ottoman Porte, which has a system of its own, is as follows:

By this agreement envoys are divided into: (A) Ambassadors, who when sent by the Holy See are called "legates" or "nuncios." These

⁶ See §151, ante.

⁷ See §152, ante.

⁸ See §153, ante.

⁹ See §154, ante.

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are sent only by states with royal honors, are personal representatives of the heads of their own states, have the privilege of direct access to the head of state and public audience. (B) Ministers plenipotentiary and envoys extraordinary, and when sent by the Holy See are called "Papal internuncios." They have no personal access and are only entitled to private audience. (C) Ministers accredited to governments. Do not enjoy title of "Excellency," have fewer honors, but little practical difference. (D) *Chargé d'affaires*. Accredited from one foreign office to another.¹⁰

The foreign envoys at any capital form what is called the "Diplomatic Corps," of which the dean or doyen is always the Papal nuncio, when there is a representative of the Holy See, and the oldest ambassador in service at that capital when there is no papal representative.¹¹

The sending of the envoy is governed by the municipal law of the sending state, which prescribes the organ of government having power to make the appointment. The envoy on leaving his country, takes with him certain documents describing him and his mission, and furnishing him with the authority to transact his official business.¹² The envoy must be received as such by the state to which he is sent before he can act for his own government.¹³

A state will refuse to receive an envoy when sent by a body not entitled to participate in international intercourse¹⁴ when there are political circumstances surrounding the mission which make the receiving state consider it inadvisable to have any intercourse at that time¹⁵ because the envoy himself is personally unacceptable¹—and also if the credentials and papers are not in proper form.²

It was formerly the practice for the state to receive a member of its own body as an envoy from another state. This practice has now been almost universally discontinued.³

The reception of the envoy is conducted according to certain rules which are largely matters of etiquette and of no particular importance, and in the 17th and 18th centuries was a matter of great pomp and ceremony. The other envoys went out to meet the new ambassador when he arrived at the outskirts of the capital, and they all proceeded together to the court. These entrances were frequently the occasion of much unseemly wrangling and fighting

¹⁰ See §155, ante.

¹¹ See §156, ante.

¹² See §157, ante.

¹³ See §158, ante.

¹⁴ See §159, ante.

¹⁵ See §160, ante.

¹ See §162, ante.

² See §158, ante.

³ See §161, ante.

among the retinues of the ambassadors and sometimes among the ambassadors themselves.⁴

An ambassador has certain prerogatives which pertain to him as the personal representative of his sovereign and are accorded today in all states. These prerogatives are: (A) title of "Excellency;" (B) privilege of remaining covered in presence of sovereign or head of state unless sovereign himself is uncovered; (C) privilege of dais in his own home; (D) coach and six outriders; (E) military and naval honors; (F) use of coat of arms over door; (G) invitations to all court ceremonies. The privilege of a dais and coach and six outriders are of no moment in modern life. The others are still of practical importance.⁵

It is well settled that an envoy as such has a certain immunity when in the jurisdiction of the receiving state. There are several interests involved: (A) the interest of a state in its envoy;⁶ (B) the individual interest of the envoy;⁷ (C) the interest of the receiving state,⁸ and (D) the interests of the individual members of the receiving state.⁹ The immunity has varied from time to time and that prevailing in ancient times appears to have been lost in the darkness and violence of the middle ages and then revived with advance in civilization. The immunity has been based upon several theories, none of which adequately explain the situation. It seems better to place the immunity upon the necessity arising from the adjustment of the conflicting interests we have referred to.

Since the envoy represents the dignity, honor and independence of the sending state, and the proper discharge of his official functions requires that he should be free from all personal constraint, and that he should have perfect freedom of communication with his home government, it follows that the receiving state must respect those immunities and not only by its own political action but by municipal law restrain the members of its own body from in any way interfering with them.¹⁰

The envoy may be protected by the sending state putting in motion any of the international factors of conduct, as by landing troops, recalling him, exacting indemnity, and sometimes proceeding to war.¹¹ The greatest protection to the envoy, however, is by act of the receiving state, which has full power over him, since he is

⁴ See §163, ante.

⁵ See §164, ante.

⁶ See §166, ante.

⁷ See §167, ante.

⁸ See §168, ante.

⁹ See §168, ante.

¹⁰ See §170, ante.

¹¹ See §171, ante.

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within the jurisdiction. The exercise of that power is restrained by the factors of international conduct, and may best be defined by discussing the extent of the immunity and the action of the receiving state under the various particular instances which arise.¹²

The interest of the receiving state, however, is of equal importance to that of the sending state, and therefore when the envoy commits acts damaging that interest, as by plotting against the security and peace of the country, or by entering into plots to subvert the government, he may well be treated as having forfeited his immunity. While cases have occurred in the past where the ambassador has been executed, the universal modern practice is to either send him letters of dismissal and require him to leave the country or demand that the sending state shall recall him. There is no distinction in practice to be drawn between these two methods of procedure, each being employed differently by various states.¹³ The interest of the sending state, requires that the envoy shall be free from action of the municipal law, particularly from subordinate departments of the government, as courts, constables, etc.¹⁴

The envoy may damage the interest of a member of the receiving state, as by refusing to pay a bill. In such case, however, he will be free from a legal process. It is more important that the interest of the sending state in him be maintained, that he be protected in his official status as an envoy than it is that the interest of the member of the receiving state should be redressed. The receiving state may, upon complaint of the member of its own body in such case, dismiss the envoy or require his recall. So, also, the envoy is not subject to compulsory attendance at court as a witness.¹⁵ Going into court and giving testimony, with the consequent liability to cross examination, may jeopardize the dignity and honor of his own state, besides being a reflection on the personal word of the envoy.

The suite of the envoy is official and non-official. The official include the various functionaries and the officials of the legation; the non-official include the family of the envoy, his household servants and private attendants.¹ The official suite of the envoy seems to have the same immunity as the envoy himself. This is necessary as these officials are important in the transaction of the business of the envoy.² The family of the envoy, in like manner, is entitled to immunity. The envoy cannot be expected to properly discharge

¹² See §172, ante.

¹³ See §174, ante.

¹⁴ See §176, ante.

¹⁵ See §177, ante.

¹ See §178, ante.

² See §179, ante.

his duties if he is concerned about the safety of his wife or children and he must be secure in their immunity as well as that of his own.³

Servants stand upon a somewhat different footing, and unless they are personal servants of the envoy they do not seem to have any immunity at all outside the residence of the ambassador.⁴

So also the residence of the envoy is free from invasion by any act of the receiving state. This is necessary in order to protect the privacy of the papers of the envoy and furnish him with a secure place in which to deliberate on behalf of his government.⁵

The immunity of the residence of the envoy was allowed to a much greater extent down to the beginning of the 19th century than in recent times. The house of the envoy was considered an asylum of refuge for criminals of all kinds, and any person entering the asylum was saved from the political power of the receiving state. Envoys made large sums of money by renting numerous houses in the neighborhood, placing on them the arms of their country, and then, for a consideration, giving protection to all sorts of scamps and scallawags who fled there in order to avoid punishment by the political power of the receiving state. This state of affairs naturally died out with the improvement in law and order, strength of government, and the asylum of the house of the envoy exists now only in certain South American states for political refugees. In those states, the constant revolutions and turmoil of political affairs have given rise to several instances when political refugees have sought protection in the residence of the envoy of a foreign power. The asylum has generally been granted, sometimes with reluctance, and seems to be more generally demanded by the receiving state than by the sending. This practice may be expected to die out with improvement in political conditions in these countries.⁶

The envoy formerly exercised extensive jurisdiction, which was necessary owing to the violence of the times and the weakness of the central government. This jurisdiction is now obsolete in modern civilized states.⁷

The privilege of religious worship, which was formerly of importance, is now immaterial where the freedom of religious worship has been fully established.⁸

In all the cases we have referred to, the immunity of the envoy is well settled in international practice and has rarely been violated

³ See §180, ante.

⁴ See §181, ante.

⁵ See §182, ante.

⁶ See §184, ante.

⁷ See §185, ante.

⁸ See §187, ante.

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in modern times. The self-interest of every state in the maintenance of the dignity of its own envoys abroad, as well as the external factors at the disposal of other states, all work together in determining the conduct respecting the immunity. This is one of the most firmly established rules of international law. There are other matters, however, in which claims are from time to time made for immunity on behalf of the envoy which are not connected with the discharge of his official duties, and in which, therefore, the states proceed upon a kind of comity, each state treating the envoy of the other state as the other state treats its envoy. These are matters of taxation,⁹ custom duties and general provision of the municipal law,¹⁰ as liability of residence to local assessments, and police, fire and quarantine regulations of the local government.

Where an envoy dies at a foreign capital, his widow is generally conceded the same immunity until her departure from the country. In all cases of departure, however, the person having immunity is expected to proceed promptly out of the jurisdiction. Any lingering on the way will be good ground to forfeit the immunity.

All classes of envoys have the same immunity.¹¹ Consuls, however, have no immunity. A discussion of them is omitted.

When the envoy is in a third state, on his way to or from the country to which he is sent, he is in a slightly different position. The former practice was to treat him with scant courtesy, and the growth of his immunity has been somewhat slower than that of the immunity of the envoy in the state to which he is sent. At the present time the practice is not firmly established. The envoy is merely passing through, and therefore no question will arise as to property or taxation. Ordinarily he will have a passport from his own country, and when that passport is produced, the country through which he goes cannot without discourtesy impede his passage.¹² When the envoy is on the high seas in time of peace, no question appears to have ever arisen.

In time of war an envoy will be in a somewhat precarious position. If he is traveling on the ship of his own country, the enemy of his country may seize him. No immunity can exist in time of war. If he is traveling on a neutral ship, he is within the jurisdiction of a neutral, and therefore cannot be seized by one of the belligerents without invading the neutrality of the state, of the ship on which

⁹ See §186, ante.

¹⁰ See §189, ante.

¹¹ See §190, ante.

¹² See §191, ante.

he is traveling.¹³ The immunity seems to begin from the time the envoy enters the country, and lasts until he leaves it, even if his official status does not begin until he has presented his letters to the head of the state, and ends when his passports have been handed him. The extension of the immunity beyond the shorter period of official status seems to be absolutely necessary. There will be very little benefit to the envoy in having the immunity during his official status when he has to pass through dangers to get there and knows he will be equally liable to danger upon returning. Reason and practice, therefore, seem to agree in giving the immunity from the time he enters the country until he leaves.¹⁴

The immunity may be waived by the state sending the envoy. Since the immunity has relation only to that state, it cannot be waived by the envoy himself. It is not a personal immunity because of his personal interest, but a state immunity because of the immunity of the state. There has been some discussion, therefore, as to whether the envoy forfeits immunity by entering in business in the receiving state. If he cannot expressly waive immunity by his own act, it is clear he cannot do so by implication.¹⁵

The interest of the envoy may be damaged by act of some member of the receiving state and it may be necessary for him to proceed as complainant. He may bring suit on the civil side of the court, if he so desires, but ordinarily he expects, owing to his privileged character, to be spared the necessity of appearing in court, and in most countries criminal proceedings will be instituted on behalf of the envoy whenever it is necessary. In some countries, however, where the municipal law requires the prosecutor to appear and give testimony, a difficulty sometimes arises as to whether the proceedings can go on in the absence of the testimony of the ambassador.¹

Controversies may arise between envoys from two or more foreign independent states, which are rare, but when they do arise are a source of great embarrassment to the receiving state. No law can be said to exist upon this subject, and the receiving state must proceed cautiously in order not to risk giving offense to either of the sending states.²

The functions of the envoy are to negotiate, report to his home government, maintain the dignity and honor of the sending state, and perform such other duties as are invested in him by law, and

¹³ See §192, ante.

¹⁴ See §193, ante.

¹⁵ See §194, ante.

¹ See §196, ante.

² See §197, ante.

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permitted to be exercised by the receiving state. In former times, envoys exercised certain powers of jurisdiction over the members of their suite. This jurisdiction, however, does not exist in modern times.³

The same observations as to language apply here as in the case of treaties. Latin was formerly used; during the ascendancy of Spain in the 16th century the Castilian tongue was employed; French then became the diplomatic language of Europe, until modern times, when each state uses its own language, accompanied, if necessary, by a translation.⁴

A diplomatic mission may be terminated by act of the sending state or by act of receiving state, change in international status of sending or receiving state, change in government or head of state of either state, by death of envoy, or act of the envoy himself.⁵

³ See §198, ante.

⁴ See §200, ante.

⁵ See §201, ante.

CHAPTER 5.

THE TERRITORY OF AN INDEPENDENT STATE.

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PRELIMINARY.

§210. It is now necessary to turn our attention to the portion of the earth's surface over which the state has jurisdiction,¹ that is, the territory of the state. In this chapter we propose to (A) point out what constitutes that territory, (B) ascertain the relation which a state sustains to it, (C) discover, if possible, the rules which regulate the division of the earth's surface among the states of the world, and (D) discuss the increase and decrease of state territory and the acquisition and transfer thereof.

DEFINITION OF STATE TERRITORY.

§211. The word "territory" in its most general significance means a tract of land or a region of more or less definite extent, and, practically speaking, connotes land only, but as generally used in international law applies to land as distinguished from the open sea, and therefore includes inland waters embraced in the territory in question. State territory, therefore, is territory over which a state exercises

¹ For definition of jurisdiction, see §§96-99, ante.

jurisdiction, that is, that part of the surface of the earth, whether land or water, over which that jurisdiction extends. A few definitions are collected in the note.²

The Relation of a State to Its Territory—Title.

PRELIMINARY—IS AN INTEREST.

§212. State territory has been defined as that part of the earth's surface over which the jurisdiction of the state extends.³ That jurisdiction is in fact the exercise of power, and the state, because of the exercise of that jurisdiction, bears a relation to its territory, the nature of which we now propose to examine. That relation may be described as an interest⁴ because the state will be affected by any

² "The territorial property of a State consists in the territory occupied by the State community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water;" Hall, *Int. Law*, 6 ed. (1909) 101. "A State's territory is that definite portion of the earth's surface which is subject to its sovereignty or imperium;" Hershey, *Int. L.*, (1912) 172. "State territory is that definite portion of the surface of the globe which is subject to sovereignty of the state;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 229. "The whole space over which a nation extends its government becomes the seat of its jurisdiction;" Vattel, (1758) Chitty's Trans. Book 1. §205. "The word 'territory' is sometimes used as an equivalent to domain or dominion or to an expression covering the sphere of state control. Territory is also used in

the stricter sense of the land area over which a state exercises its powers;" Wilson, *Int. L.*, (1910) 97. "The territory of a state includes all that portion of terra firma which lies within the boundaries of the state, as well as the waters, that is, the interior seas, lakes and rivers wholly contained within the same lines;" Woolsey, *Int. L.*, 6 ed. (1897) 67.

³ See §98, ante on territorial jurisdiction. This jurisdiction was described by the early writers as *dominium*, *imperium*, *sovereignty*, all of which ambiguous terms will be discarded, although many modern writers persist in using them. See §48, ante on sovereignty.

⁴ See §4, ante on definition of an interest. A state may have an interest in territory under the jurisdiction of another state, as the interest of France, from 1870 to 1918, in the provinces of Alsace-Lorraine, crushed under the iron heel of barbarous Germany. Interest and jurisdiction are not, therefore, coterminous, but they must coincide before any territory can be described as the territory of any particular state, that is, the state must be able to enjoy the interest to its fullest extent.

§213

History of State Title

change in the territory or by anything done to it. That interest resides in and is controlled by the government of the state in its corporate capacity as the organ of the state, which control may or may not be to the advantage of the people. We have to consider that interest in its external or international aspect, and in its internal or municipal aspect.⁵

HISTORY OF STATE TITLE.

§213. When the systematic study and exposition of international law was first begun, the states of Western Europe existed as monarchies and the territory which the monarch governed was identified as his property and lay in his personal disposition, and the various kingdoms of Europe were disposed of with the same freedom as an individual exercised with respect to his private property, although at that time a distinction was drawn between property which belonged to the monarch as a private person, and property belonging to the crown. The rules of Roman law regulating immovables were thought to be applicable to the property of the state, and consequently this department of international law has been affected very largely by Roman real property law.⁶ There is no objection to this as the Roman law furnished many analogies which were extremely useful. With the growth of democracy and the limitation of the power of the monarch, the nature and extent of the state interest in its territory clearly appeared, and the private power and ownership of the monarch were eliminated, as the interest of the people became of paramount importance.⁷ The conceptions of the Roman law have still remained and been applied with more or less success to the interest of a state in its territory.

⁵ We thus have (a) the territory, (b) the state organism, (c) the government of the state, (d) the exercise of jurisdiction by that government over the territory, (e) the interest of the state in its territory.

⁶ Hershey, *Int. L.*, (1912) 172n⁴; 1 Oppenheim, *Int. L.*, 2 ed (1912) 283; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 324-327; Westlake, *Principles of Int. Law*, (1894) 132, et seq.

⁷ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 230, advances the following statement: "It is for this reason (that is, that the state is not identified as the

private property of the monarch) that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will and without the consent of Parliament." This statement is open to objection. The restriction by municipal law upon alienation was introduced by the people in order to prevent the monarch from disposing of the state jurisdiction, not because they recognized that the state jurisdiction was not the private property of the monarch. Consequently, a state may

THE EXTERNAL OR INTERNATIONAL ASPECT OF STATE TITLE TO TERRITORY.

§214. The interest of a state in its territory when regarded from an international point of view, with which we are concerned, simply presents an existing fact, to-wit, the exercise of jurisdiction over territory which bears a strong analogy to the possession of land in the municipal law. In its external aspects as respects other states, this jurisdiction has the appearance of a private title, and it is the common statement among the writers that a state has a property in its territory or title to its jurisdiction.⁸ It is sufficiently accurate to speak of the title of a state to its territory, describing thereby the relation to that territory which has already been analyzed, and to use words of ownership, as belonging, property, etc., bearing in mind that while, from an international point of view, such language is appropriate, yet there is a clear distinction between the relation described and the ideas in the municipal law connoted by the use of those words.⁹ Where necessary the distinction will be indicated by the phrases "international title" and "municipal title." The writers commonly say that a state has a right to its territory without defining the sense in which they use the word "right."¹⁰ It can only be used in this connection as meaning an interest which is protected primarily by the inherent power of the state, and secondarily, by the international factors of conduct, and not by any superior political power.

exist, as the learned author insists is probably the case in Great Britain, where no such municipal regulation obtains. The people may or may not, as they see fit, impose this restriction.

⁸ Vattel, (1758) Chitty's Trans. Book II. §79, et seq. See §219, n. 5, post, as to ambiguity of the word property.

⁹ Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 231, says: "State territory is an object of the law of nations because the latter recognize the supreme authority of every State within its territory." The objections to this statement have already been pointed out, see §113, ante. See 1 Halleck, Int. L., 4 ed. (1908) 156, et seq.; 1 Westlake, Int. L., 2 ed. (1910) 90, n¹.

¹⁰ "As between nations, the proprietary character of possession enjoyed by a state is logically a necessary consequence of the undisputed facts that a state community has a right to the exclusive use and disposal of its territory as against other states, and that in international law the state is the only recognized legal person;" Hall, Int. Law, 6 ed. (1909) 45; Martens, G., Law of Nations, (1788) Cobbett's Trans. III. I. 1.; Twiss, L. of Nations, Peace, 2 ed. (1884) 230. "The exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest or cession, and subsequently confirmed by the presumption arising from the lapse

§215

Internal Aspect

INTERNAL ASPECT OF STATE TITLE TO TERRITORY.

§215. The internal relation of a state to its territory and property within the jurisdiction, that is, the manner, method and extent to which the jurisdiction of the state is exercised over such property, is a matter of municipal law and not within the purview of the international lawyer. The state discretion in this respect may be limited by international obligation, in which case the state fails in performing that obligation in so far as it omits to make its municipal law conform. The jurisdiction of the state over its territory does not confer any title of a technical nature known to municipal law upon any portion of the land over which the jurisdiction extends. The state may by virtue of that jurisdiction regulate all private titles to land within the territory and may exclude any other state from exercising any jurisdiction therein. Private property coming within the jurisdiction is likewise subject to the state power and the private title to that property formerly obtaining may be changed by the state in which it now is in such manner as that state may determine.¹¹ These cases generally fall under the heading of private international law, but the principle obtains that each state recognizes these changes as state acts and that they are valid among states from an international point of view. A state may own a particular piece of property just as an individual and, in such case, the title of the state will be regulated by municipal law.¹² The state may own such property within its own territory or within the territorial limits of another state.

of time, or by treaties and other compacts with foreign States;" Wheaton, *Elements*, Dana's ed. (1866) 238. See §115, ante, on rights in international relations. "This right (i. e.—right of a nation to a country) comprehends two things: 1. The domain, by virtue of which the nation alone may use the country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage it is capable of yielding. 2. The empire, or the right of a sovereign command, by which the nation directs and regulates at its pleasure everything that passes in the country;" Vattel, (1758) Chitty's *Trans.* Book II. §204.

¹¹ See §920, et seq., post, on private property at sea in war. See §875, et seq., post, on private property on land

in war. See §448, et seq., post, on property of an alien in the state. For a discussion of the irrelevancy of eminent domain in considering the aspect of state territory in international life, see Hershey, *Int. L.*, (1912) 172n¹; Lawrence, *Int. Law*, 5 ed. (1913) 140; 1 Westlake, *Int. L.*, 2 ed. (1910) 87–90; Woolsey, *Int. L.*, 6 ed. (1897) 62. For eminent domain as affecting an alien see §446, post. See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 229. See §886, post, on so-called right of angary as a branch of eminent domain.

¹² See §§182, 186, ante, on property of envoys. See §149, ante, on head of state. See §96, ante, on territorial jurisdiction. See §219, post, on distinction between jurisdiction and state municipal title.

The Relation of a State to its Territory

§216

TWO OR MORE STATES IN THE SAME TERRITORY.

§216. It is not possible for two complete exclusive jurisdictions to exist in the same territory at the same time.¹³ There must be a division of the jurisdiction between the two, or one must exercise its jurisdiction in subordination to the other. The principal instance of such a division is the case of an independent and dependent state. In the case of a lease or a perpetual grant, the terms of the lease or grant govern as to the exercise of the jurisdiction. Where there is a joint administration of a territory by two or more independent states, it seems clear that there is either a division of the jurisdiction between them or the creation of a political subdivision which exercises the entire jurisdiction on behalf of and as agent of the states concerned. The term condominium is used by the writers to indicate a number of different instances of a division of state jurisdiction over a piece of territory, and cannot be said to have any clear or definite meaning.¹⁴

¹³ See §98, ante, on territorial jurisdiction, and 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232, 233. The statement of this learned writer, however, that a (a) condominium, (b) lease, (c) perpetual grant, (d) division between federal and particular states, are apparent but not real exceptions to the principle that there cannot be two jurisdictions in the same territory, is open to objection. A number of cases of joint administration or administration of the territory of one state by another are discussed under the heading of "Rights to occupy and administer," by 1 Westlake, *Int. L.*, 2 ed. (1910) 137. A piece of territory may be administered by a foreign power with the consent of the owner state. 1912—Since 1878 Turkish Island of Cyprus has been under British administration. 1878–1908, Turkish provinces of Bosnia and Herzegovina were under the administration of Austria-Hungary; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232–233; 1 Westlake, *Int. L.*, 2 ed. (1910) 137.

¹⁴ The following instances of condominium have been referred to:

Schleswig-Holstein and Lauenburg were from 1864 to 1866 under the condominium of Austria and Prussia. Moresnet (Kelmis) on the frontiers of Belgium and Prussia is (in 1912) under the condominium of the two states because they have not come to an agreement regarding interpretation of a boundary treaty of 1815 between the Netherlands and Prussia; 1 Halleck, *Int. L.*, 4 ed. (1908) 72n²; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232. Sudan (1912) is under condominium of Great Britain and Egypt since 1898; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232n¹. See Wilson, *Int. L.*, (1910) 94. New Hebrides under condominium of Great Britain and France; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232n²; Wilson, *Int. L.*, (1910) 95. For text of convention of Oct. 20, 1906, see 1 American J. *Int. L.*, Supp. 179. "Le Condominium France-Anglais des Nouvelles-Hebrides," (1908) N. Politis. See 3 Amer. J. *Int. Law*, 1056. As to Spitzbergen. See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232n³ and Robert Lansing in 11 Amer. J. *Int. Law*, 763 et seq.

§217

Independent and Dependent State

THE RELATION OF AN INDEPENDENT STATE TO THE TERRITORY OF A DEPENDENT STATE.

§217. A state may be dependent on an independent state, and the notion of territory appertains to each. It is common to confine the definition of state territory to independent states, which, it is apprehended, is erroneous, as the distinction is not in the fact of the territory but on the dependence or independence of the states.¹⁵ In the case of a dependent state, the nature of the jurisdiction of the parent state over the territory of the dependent state will vary according to the relation between the two.^{16*} Where there is a colony or a protectorate, there are separate territorial entities. In this case the territory of a dependent state is not part of the corporate territory of the parent state. The parent state has an interest in the dependent state, and exercises its jurisdiction over the territory of the latter through its interest in the state organization, just as a brigadier general commands a regiment through its colonel.¹ In a federal government, there is a division of the jurisdiction between the federal government and the member states, and both jurisdictions rest upon the same territory independently of each other.² In a confederacy, the parent state appears to have no jurisdiction over the territory at all, but rests entirely on the dependent member states.

¹⁵ The territory of a member state of the United States of America, as New Jersey or Georgia, is just as much a fact as the territory of the United Kingdom of Great Britain and Ireland, the only difference being in the relation which the former states bear to another superior state.

^{16*} See §52, ante, on relation between independent and dependent states.

¹ Hall, *Int. Law*, 6 ed. (1909) 126, discusses a protectorate under territorial property of a state but seems to correctly apprehend that the protected state is not an integral portion of the territory of the parent state. Hershey, *Int. L.*, (1912) 173n⁷, says: The land domain consists of all colonies and dependencies, but does not strictly include a vassal state under suzerainty or a protectorate, but that no general rule can be laid down. Oppenheim, *Int.*

L., 2 ed. (1912) Vol. 1, 230, 231, distinguishes motherland and colonies, and says colonies rank as territory of the motherland, that a vassal state is not in strict sense of the term, a part of the territory of the suzerain. "Two degrees of qualified territorial jurisdiction are exercised in the protectorate and the sphere of influence;" Wilson & Tucker, *Int. L.*, (1901) 103.

² The federal government of the United States of America was created by act of the several states, and consequently rested on and had jurisdiction over only the territory comprehended within the boundaries of those states, and never had any territory of its own, except (a) in the District of Columbia, (b) such as was ceded to it by a state or (c) acquired from third states. See §56, ante, on form of state government. See §236n¹⁴, post.

ORIGIN OF STATE TITLE OR THE RELATION OF A STATE TO ITS TERRITORY.

§218. The interest of a state in its territory is a fact which may originate in various ways which it is not necessary to enumerate. Given the facts of a state, a particular territory, an interest of the state in that territory, we may say that the state relation originates when the power of the state protects the interest and enables the state to enjoy it in fact. A state may acquire territory when it establishes an interest in territory and protects that interest by its jurisdiction. The acquisition of the territory may be (A) contemporaneous with the origin of the state; (B) a state with territory may acquire additional territory or lose some that it already has. The case under (A) is sufficiently disposed of by the discussion of the origin and extinction of states, and our attention will be confined in this chapter to the case where additional territory is acquired, which may be (A) by circumstances occurring in connection with the territory itself, (B) the acquisition of the territory of no state, (C) acquisition of territory from another state, which latter case involves two parties, the transferor and the transferee, and is therefore considered under the heading of transfer of state territory.³

DISTINCTION BETWEEN JURISDICTION OVER STATE TERRITORY AND STATE MUNICIPAL TITLE TO PROPERTY.

§219. The relation of a state to its territory is an interest protected by the exercise of the jurisdiction and independent of and irrespective of private ownership of the land by any title known to the municipal law, which latter titles are subject to and controlled by the jurisdiction.⁴ The jurisdiction may be considered as being superimposed upon all private possession and ownership. The state may assume the relation to a piece of property known in the municipal law as a title, and that property may be within its own jurisdiction, in the jurisdiction of another state, in jurisdiction of no state, or on

³ Woolsey, *Int. L.*, 6 ed. (1897) 65, says a nation may derive its title (1) from occupation of land which was before vacant and from prescription public and uninterrupted; (2) from occupation by colonies or other incorporation of land before occupied; (3) from conquest accepted as a fact

and at length ending in prescriptive right.

⁴ Lordship and ownership distinguished by Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. III. IV.; Vattel, (1758) Chitty's *Trans.* Book I. §§204, 234-236; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 230.

§220

Contiguous, Non-contiguous Territory

the high sea.⁵ The jurisdiction is the exercise of power over municipal title. The municipal title is subordinate to the exercise of the power and a state may stand in both relations. It is apprehended, however, that it is erroneous to speak of such municipally owned property as private property, which term was applied to the private property of the monarch as distinguished from property of the crown. All state property is public property, and unless we adhere to this definition we shall be involved in difficulties when we discuss the distinction between public and private property in war.^{6*} There is an ambiguity in the word "property," however, which should be noted, as a failure to bear it in mind may lead to erroneous conclusions. Property is used to indicate the property owned and also to mean the relation of ownership to that object.⁶ It will be used in this discussion in the first sense.

CONTIGUOUS AND NON-CONTIGUOUS STATE TERRITORY.

§220. The territory of a state may be (A) all in one piece, which is called *integrate territory*,⁷ (B) in two or more non-contiguous pieces, with territory of another state or states intervening, which is called *dismembered territory*,⁸ (C) entirely surrounded by the territory of another state, called an *enclosure*.⁹ This term is generally applied to small states although every non-maritime state is an enclosure.

* Note on state holding property by municipal title: Great Britain holding share in Suez Canal Co., and title to legation in Washington, United States of America. Euricles, King of Sparta, owned the Island of Cythera "in his own private right;" Zouche, L. of Nations (1650), Carnegie ed., Part I. III. 1. United States of America: Title to land in Washington, D. C. Title to land in the several states. See §183n¹⁸, post.

** See Chapter 14, post, on public property in war.

⁵ As to ambiguity of the word "property" see Hall, Int. Law, 6 ed. (1909) 45 et seq.; 1 Halleck, Int. L., 4 ed. (1908) 160; Wilson & Tucker, Int. L., (1901) 148.

⁷ E. g.—Switzerland.

⁸ Rhine provinces of Prussia were formerly cut off by Hesse from the rest of the kingdom; Great Britain and her colonies; United States of America and Alaska, Philippine and Hawaiian Islands.

⁹ The Papal former territory of Avignon and the Venaissin were enclosed in France. Woolsey, Int. L., 6 ed. (1897) 67, calls them enclaves. San Marino in Italy. Birkenfeld, part of the Grand Duchy of Oldenberg, is an enclosure of Prussia; 1 Oppenheim, Int. L., 2 ed. (1912) 230. Bolivia in South America is an enclosure of Brazil, Peru, Chile, Argentine Republic and Paraguay. Paraguay in South America is an enclosure of Bolivia, Brazil and Argentine Republic.

FICTION OF EXTRA TERRITORIALITY.

§221. It was formerly supposed that, in certain cases, the territorial jurisdiction of one state extended into that of another,¹⁰ and this conception was relied on to explain many cases, as ambassadors,¹¹ vessels,¹² capitulations,¹³ etc., where a state made an exception in its municipal law with respect to the agents of another state. The exception in the municipal law resulted, as has been pointed out in the proper place,¹⁴ from the obligation of international law resting on the state. The conception of extra-territoriality has been generally recognized as a pure fiction which no doubt has played its part in the development of the law, but may now be discarded without difficulty. If a state has exclusive independent jurisdiction over its own territory, it is obviously a contradiction in terms and a disregard of the facts to say that the territorial or any jurisdiction of one state projects into that of another.

Nature and Extent of Territory of the State.

PRELIMINARY.

§222. The territory of a state consists of the land or water over which the jurisdiction extends and its nature is therefore the same as the nature of the surface of the earth.^{14*} With respect to the physical characteristics of the earth's surface, we may distinguish (A) land, (B) water, which latter is either (a) enclosed in land or (b) the open sea, and (C) the places where the land and the open sea meet. There is an unfortunate ambiguity among the writers in the use of the word "territory."¹⁵ Some confine it to land and exclude water.

¹⁰ Confer, "Extra Territoriality," (1907) Sir Francis Pigott, being a treatise on the law relating to consular jurisdiction and residence in Oriental countries. See Hall, *Int. Law*, 6 ed. (1909) 166; Manning, *Int. L.*, 2 ed. Amos. (1875) 110, 117; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 507n¹; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 271; Woolsey, *Int. L.*, 6 ed. (1897) 91, et seq.; Wheaton, *Elements*, Dana's ed. (1866) 300. See §98, ante, on territorial jurisdiction.

¹¹ See §170, ante, on ambassadors.

¹² See §285, post, on vessels on high seas.

¹³ See §461, post, on capitulations.

¹⁴ See §96, et seq., ante.

^{14*} Hershey, *Int. L.*, (1912) 173, classifies the extent of a state's territory as follows: 1. The Land Domain. 2. The Maritime and Fluvial Domain, or territorial waters, using the latter phrase in a general sense. 3. Aerial space.

¹⁵ "It is accordingly becoming more common to use the word 'territory' in the stricter sense as applying to the

§§223, 224

Land

Others use the phrase "territorial waters" to include waters in land territory and exclude marginal waters, that is, the borders of the open sea. This phrase is, on the other hand, sometimes used to indicate the marginal waters or marginal belt exclusively. The ambiguity will be avoided by using "maritime belt" to refer to marginal waters, and the word "territory" as defined at the beginning of this section to refer to the surface over which the jurisdiction of the state extends whether land or water. Territorial waters therefore will be used to designate inland waters. We shall discuss land and such waters as lie in the territory of a state. The maritime belt and the open sea will be discussed in a subsequent chapter.

 Land.

 PRELIMINARY.

§223. Where territory or part of the territory is composed of land, it is clear that the jurisdiction of the state extends over the whole surface of the earth within the territorial limits,¹⁸ and when that jurisdiction is independent and exclusive, the jurisdiction is necessarily exclusive. The only question is as to how far that jurisdiction extends in the subsoil and the aerial space over the territory.

SUBSOIL AND AERIAL SPACE OVER TERRITORY.

§224. If the state has exclusive jurisdiction over the surface of the territory, it seems to follow that it has like jurisdiction over the atmosphere and subsoil. No case appears to have arisen, and it is therefore impossible to say what the law is. An attempt has appar-

land of a state, over which the sovereignty is more absolute than over the water or atmosphere;" Wilson, *Int. L.*, (1910) 78. Territorial waters consist of rivers, canals and lakes which water the land and of the maritime belt and gulfs, bays and straits of the sea; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 235. Hall, *Int. Law*, 6 ed. (1909) 157, seems to note the distinction that the phrase "territorial waters" is sometimes used as applying to all water in territory and sometimes as applying to marginal waters.

¹⁸ "The land domain consists of all the land (including colonies and dependencies) to which the state has a valid title. . . . Also includes all islands formed within territorial waters;" Hershey, *Int. L.*, (1912) 173. This is ambiguous, as the state may have a valid title to land in the jurisdiction of another state. See §219, ante. But that land is not part of its domain. See §217, ante, as to interest of an independent state in the territory of the dependent state.

ently been made to limit the jurisdiction of the state to a certain height above the subsoil on the analogy of the zone in the case of marginal rights in the sea. The interest in and power over the surface seems to include subsoil and air, as the greater includes the less. No other state can exercise any power in either of these cases without interfering with the surface.¹⁷

Water.

PRELIMINARY.

§225. The surface of the earth is largely composed of water, and a number of questions arise as to the nature of the independent exclusive state jurisdiction over it. There is a distinction between water lying between two or more states, and water entirely surrounded by

¹⁷ Hershey, *Int. L.*, (1912) 173, says: "This jurisdiction over the subsoil which extends to an indefinite depth arises from the necessity—a need increasingly felt—of conserving for future generations the rich treasures found beneath the earth's surface." Upon this it is to be observed (a) it is doubtful if the modern idea of conservation was known to the Roman lawyers, (b) the reason assigned would not prevent France from digging a tunnel under the English Channel, and yet it is probable that all would agree that such an act would be an invasion of English exclusive jurisdiction. The question of conservation is entirely a matter of municipal law, and ownership of the subsoil is entirely consistent with waste of resources, as in the United States of America. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 235, 236, says: The subsoil and space of the territorial atmosphere are of importance because of the uses to which they may be put, but are not special parts of state territory. A Congress of Aviation, meeting in Paris in 1910, attempted to lay down rules, which were not accepted. For bibliography of the literature on the subject

see: 1 Oppenheim, *Int. L.*, 2 ed. (1912) 237n. See "The Law of the Air-Ship," Simeon E. Baldwin, 4 *Amer. J. Int. Law*, 95 et seq.; "The Law of the Air," (1911) H. D. Hazeltine; reviewed in 25 *Harv. Law Rev.* 486, et seq. and 6 *Amer. J. Int. Law*, 251; "The International Law of Aerial Space," Amos S. Hershey, 6 *Amer. J. Int. Law*, 381 et seq.; "Law of Aerial Space in Time of Peace," Hershey, *Int. L.*, (1912) 232-237; "The Beginning of an Aerial Law," Arthur K. Kuhn, 4 *Amer. J. Int. Law*, 109 et seq.; "Sovereignty of the Air," Blewett Lee, 7 *Amer. J. Int. Law*, 470 et seq.; "Aerial Domain," Wilson, *Int. L.*, (1910) 87; "Aerial Jurisdiction," Wilson, *Int. L.*, (1910) 120-125; Lawrence, *Int. Law*, 5 ed. (1913) 146; "Air Sovereignty," (1910) Dr. J. F. Lycklama a Nijeholt. See 5 *Amer. J. Int. Law*, 555. "Il Diritto Aereo," (1911) Enrico Catellani. See 7 *Amer. J. Int. Law*, 672. See §751, post, on aerial forces in war. See §752, post, on submarine forces in war. See Resolutions of the Institute of International Law, at meeting of 1911, Carnegie Ed., 170.

§226

Water

the territory of a state. Where the water lies entirely within the territory of one state, it is clear that the jurisdiction of the state extends entirely over it because that jurisdiction extends over the entire land surrounding the water, and therefore if it is independent and exclusive, no other state can have access to the water or exercise its jurisdiction therein without invading the jurisdiction of the state surrounding the water.¹ It therefore follows that the surrounding state is able to exclude all others, and hence its jurisdiction over the water is sole and complete. It is immaterial that the body of water is connected with another body of water which is subject to a different principle, provided the connection between the two bodies of water is entirely under the control of the state surrounding the interior body. If that is the case, the state can, by its control of the connecting body, effectually exclude access to the interior body of waters. Where the body of water lies between two or more states, as the open sea, a lake or a river, no state can in fact assert the same jurisdiction over the water as when it is entirely surrounded by the territory of one state. There is, therefore, a distinction to be observed in these cases. The arrangement of the discussion appears in the note.²

CANALS.

§226. Canals³ are (A) intrastate, usually called "national," which are entirely within the territory of a state,⁴ and (B) interstate, which are bounded by territories of two or more states and running between branches of the open sea. No question appears to have arisen as to the first, which are clearly the property of a state within whose territory they are situated and subject to the same principles as an intrastate river. There are only two interstate canals in existence, each of which are fully covered by treaty.⁵

¹ Vattel, (1758) Chitty's Trans. Book I. §294.

² The open sea..... §277 et seq.

Shores of the open sea,
the maritime belt.... §311

Branches of the open sea:
Small seas..... §304

Gulfs and bays..... §305

Straits..... §306 et seq.

Canals..... §226

Rivers..... §227

Lakes and landlocked
seas..... §232

³ See Hershey, Int. L., (1912) 208; 1 Oppenheim, Int. L., 2 ed. (1912) 248.

⁴ *E. g.*—Kiel Canal, Corinth Canal, Cape Cod Canal.

⁵ (a) Suez Canal. For historical discussion and summary of the provisions of the Conventions of Constantinople of 1888 neutralizing the canal, see 1 Westlake, Int. L., 2 ed. (1910) 339-346; see also Lawrence, Int. Law, 5 ed. (1913) 198 et seq.; 1 Oppenheim, Int. L., 2 ed. (1912) 249. See Resolutions of the Institute of International Law, at

Rivers.

PRELIMINARY. KINDS OF. USE OF.

§227. Rivers are of several kinds, (A) intrastate, which are those running from their source to their mouth entirely through the territory of one state, some of which will empty into the open sea and be navigable part way from the mouth; (B) interstate, which are those which pass through the territory of two or more states in the course of their flow, either as a boundary river, with the territory of a different state on each bank, or entirely passing from one state to another. Some of these will also flow into the open sea and be navigable part way from the mouth. The writers use the word "national" for intrastate rivers, and "international" for interstate

meeting of 1879, Carnegie Ed., 23. (b) Panama Canal. By Hay-Pauncefote Treaty of 1901. Great Britain and United States neutralized canal. (For text of this treaty see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 251.) By Hay-Varilla Treaty between Panama and United States, United States guaranteed independence of Panama, and Panama ceded strip in perpetuity for canal, which is to be neutral and open to vessels of all nations; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 254. For discussion of the controversy between Great Britain and United States of America over the collection of tolls by the United States, see American Society of International Law, 7th Annual Meeting. For a discussion of the Clayton-Bulwer Treaty of April 19, 1850, and text, see Lawrence, *Int. Law*, 5 ed. (1913) 200 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 304-311; 1 Westlake, *Int. L.*, 2 ed. (1910) 347 et seq. See "Neutralization of the Panama Canal," Peter C. Hains, 3 *Amer. J. Int. Law*, 354 et seq. "The Significance of the

Hay-Pauncefote Convention," Charles Cheney Hyde, 14 *Harv. Law Rev.*, 528 et seq. "The Isthmian Canal Treaty," Charles Cheney Hyde, 15 *Harv. Law Rev.*, 725, et seq. "The Panama Canal Act and the British Protest," John Holladay Latané, 7 *Amer. J. Int. Law*, 17, et seq. "Legal Rights under the Clayton-Bulwer Treaty," Freeman Snow, 3 *Harv. Law Rev.*, 53, et seq. "The Panama Canal Controversy: A Lecture delivered before the University of Oxford on October 25, 1913," Sir H. Erle Richards. See 8 *Amer. J. Int. Law*, 415. "The Panama Canal Conflict between Great Britain and the United States of America: A Study," (1913) L. Oppenheim. See 8 *Amer. J. Int. Law*, 415. "Il Canale di Panama," (1913) Enrico Catellani. See 8 *Amer. J. Int. Law*, 401. "The Panama Canal," (1911) Harmodio Arias. See 6 *Amer. J. Int. Law*, 243. "The Real Status of the Panama Canal as Regards Neutralization," H. S. Knapp; 4 *Amer. J. Int. Law*, 314.

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Rivers

rivers.⁶ The obscurity of the words "nation" and "national" has already been referred to.⁷

A river is principally used for (A) navigation, (B) utilization of flow, (C) fishing, (D) riparian use. The jurisdiction of the state over the river is distinct and superimposed on these uses, which are usually defined by the municipal law and exercised by individuals. As between two or more states, the controversies over rivers have been generally confined to navigation,⁸ as the other uses appertain only to the owners of the banks and these are adjusted, so far as they conflict, by the municipal law of waters, as to which there may sometimes be a necessity of joint state action, in the case of boundary or upper and lower riparian ownership.⁹ The discussion in international law, therefore, is principally confined to navigation.¹⁰

RIVERS ENTIRELY WITHIN A STATE.

§228. It is clear that a state which has exclusive independent jurisdiction over the banks of a river will necessarily control the water in the river and all use thereof, because no other state can have access to the river from any direction without invading that jurisdiction.¹¹

* "Navigable rivers which flow through or between several states into the open sea are called "International Rivers;" Hershey, *Int. L.*, (1912) 205. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 239-240, speaking of rivers running through two or more states or forming a boundary between two states, as not national, classifies as international rivers those which pass through or separate two or more states and are navigable from the open sea. He says that they are international because freedom of navigation in time of peace on all those rivers in Europe, and on many of them outside of Europe, for merchantmen of all nations, is recognized by international law. The law cannot recognize anything. A river as such is a physical fact, apart from any rules of international law. "An international river is a navigable

river which flows through the territories of two or more states, as the Rhine flows from Switzerland into Germany and then into the Netherlands, and which forms a boundary between states, as the Danube between Roumania, on the one side, and Servia and Bulgaria, or Turkey, the suzerain of Bulgaria, on the other;" 1 Westlake, *Int. L.*, 2 ed. (1910) 145, 146.

⁷ See §§44, 127, ante.

⁸ See 2 Moore, *Dig. of Int. L.*, (1906) 451.

⁹ See Hall, *Int. Law*, 7 ed. (1917) 142.

¹⁰ Hall, *Int. Law*, 6 ed. (1909) 136.

¹¹ See Grotius, *Belii, ac. Pacis* (1625), Whewell's *Trans.* II. II. XII.; Hershey, *Int. L.*, (1912) 205; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 240; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 232.

RIVERS FLOWING THROUGH TWO OR MORE STATES.

§229. Where a river flows through two or more states, each state may exclude the other from any use of the river within its territory. No outside state can approach that river from the river bank without invading the exclusive jurisdiction of the state thereover, and no state can go down the river or up the river without in like manner invading the exclusive jurisdiction necessarily extending entirely across the river. Where, therefore, a river flows through two or more states, the several riparian states may each exclude the other from any use of the river within its own territory.¹² and the exercise of that power is unrestrained except by the factors hereinafter referred to.

BOUNDARY RIVERS.

§230. A boundary river is a river running between two or more states on which different states own the opposite banks. They are in the position of riparian owners, and the question is, how is the river and its banks divided between them. There are certain presumptions of fact borrowed from the Roman law which are applied¹³ unless the facts are otherwise.¹⁴

HISTORY AND PRESENT STATUS OF RIVERS.

§231. It seems clear that each state has in fact full power over rivers or parts of rivers in its jurisdiction, and that any restraint on that jurisdiction in favor of any use of such river will be imposed by some one or more of the international factors of conduct. The growth of commerce has brought into play the factors of self interest and pressure from other states, which, reinforced by public opinion,

¹² Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. III. VIII.; Hall, *Int. Law*, 6 ed. (1909) 136; Vattel, (1758) Chitty's Trans. Book I. §266.

¹³ 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 342-345.

¹⁴ As where by possession or agreement the division is otherwise, "Hamburg has the Elba, and Bremen the Weser for their whole width from the respective city to the mouth of the river, and by the Peace of Westphalia (1648) Sweden had the whole width of

the Oder;" 1 Westlake, *Int. L.*, 2 ed. (1910) 145. See as to boundary rivers, Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. III. XVI.-XVIII.; Hall, *Int. Law*, 6 ed. (1909) 123-124; 1 Halleck, *Int. L.*, 4 ed. (1908) 182; Hershey, *Int. L.*, (1912) 205; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 241; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 236, 237, 249-251; Vattel, (1758) Chitty's Trans. Book I. §266-272. "Notes on Rivers as Boundaries," Charles Cheney Hyde, 6 *Amer. J. Int. Law*, 901 et seq.

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Rivers

have resulted in the rivers of the world being generally open to navigation by all states, with the only exception of the restraint arising during war. Down to the end of the 17th century, each state exerted exclusive control over the rivers within its jurisdiction and generally levied tolls upon their use by members of other states. By treaties as to interstate rivers and unilateral state action as to intrastate rivers, the principal rivers of the world have been open to free navigation. The immense general advantage of the opening of rivers to foreign commerce becoming apparent, the economic necessity gave teeth to the argument that such general navigation existed as a supposed right, and the argument hastened the general recognition of the fact that rivers should be opened to navigation and that recognition brought about the accomplishment of the fact. The subject has been discussed at length by the writers, but the learning is now practically obsolete.¹⁵ The facts as to the principal rivers of the world are referred to in the note.¹⁶

¹⁵ Hall, *Int. Law*, 6 ed. (1909) 137 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 184, 185; Lawrence, *Int. Law*, 5 ed. (1913) 207; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 223 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 147-160. "International Rivers." (1918) By G. Kaeckenbeeck, with an introductory note by Henry Goudy. See 67 *Univ. of Pa. Law Rev.* 205; 13 *Amer. J. Int. Law*, 373. "Notes on Rivers and Navigation in International Law," Charles Cheney Hyde; 4 *Amer. J. Int. Law*, 145. See Resolutions of the Institute of International Law, at meeting of 1887, Carnegie Ed., 78.

¹⁶ **European Rivers:** Congress of Vienna by final Acts 108-117 (called *Annexe XVI.*) provided "that navigation of all rivers separating or traversing different states, should be entirely free from the point where each river became navigable to the point of its disemboguing into the sea." For translation of the text see 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 229. Peace Treaty of Paris of 1856, by Art. 15, expressly declared . . . that the principle of the Vienna Congress was a

part of European public law. Hall, *Int. Law*, 6 ed. (1909) 137, says the Congress of Vienna recognized the right to collect moderate navigation dues and stopped short of applying the principle to rivers lying entirely within one state; that the arrangements made in 1880 by the riparian states of the Elbe and Rhine by the restrictions imposed upon river traffic were a definite retrogression from the principle of free navigation, and that there is room to doubt whether, in view of the actual practice in Europe, the treaties of Paris and Vienna were intended to give such a complete principle of navigation as had been supposed. See as to Congress of Vienna and European Rivers; 1 Halleck, *Int. L.*, 4 ed. (1908) 186-188; Hershey, *Int. L.*, (1912) 206n²; 1 Moore, *Dig. of Int. L.*, (1906) 628; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 241-244; 1 Westlake, *Int. L.*, 2 ed. (1910) 148-154; Wheaton, *Elements*, Dana's ed. (1866) 276. See Resolutions of the Institute of International Law, at meeting of 1911, Carnegie Ed., 168. Many of the tolls levied on German rivers were proprietary rights

acquired under an authority which at that time was national (the empire), but surviving as an anachronism in a time when international relations had become established on the rivers in question. *E. g.*—Toll collected by the King of Hanover on the Elbe below Hamburg; abolished 1861; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 253; 1 Westlake, *Int. L.*, 2 ed. (1910) 160n². **Danube**: 1812—Treaty of Bucharest between Russia and Ottoman Porte concluding Russo-Turkish War of 1809–12, secured the free navigation of the Pruth and the Danube within certain limits to the subjects of the contracting parties; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232. 1828—Treaty of Adrianople provided that the right bank of the Danube, from the confluence of the Pruth to the St. Georges mouth, should continue to belong to Turkey, but that it should remain uninhabited for a distance inland of about six miles, and that no establishment of any kind should be formed within the belt of land thus marked out; Hall, *Int. Law*, 6 ed. (1909) 124n¹; Walker, *Man. Int. L.*, (1895) 36. 1856—March 30—Treaty of Paris—Art. XIV.—and supplement of March 13, 1871, contained provisions as to free navigation of the Danube. For some of the provisions see 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 81n². See Twiss, *L. of Nations, Peace*, 2 ed. (1884) 241–248; 1 Westlake, *Int. L.*, 2 ed. (1910) 151 et seq.; Walker, *Science, Int. L.* (1893) 163n². "The documents concerning navigation on the Danube are collected by Sturdza, 'Recueil de documents relatifs à la liberté de navigation du Danube' (Berlin, 1904);" 1 Oppenheim, *Int. L.*, 3 ed. (1912) 242, n¹. "The European Commission of the Danube," Edward Krehbiel, 33 *Pol. Sc. Quar.* 38. "La Question du Danube." Preface by Louis Renault. (1911) G.

Demorogny. See 6 *Amer. J. Int. Law*, 766. **Douro**: 1835—Treaty of Lisbon. Spain and Portugal agreed to the freedom of navigation of the river Douro for the subjects of both contracting parties; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232. **Elbe**: June 23, 1821, declared free. Tolls on abolished by Treaty of Hanover, 1861; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 253 et seq.; Walker, *Man. Int. L.*, (1895) 37; Walker, *Science, Int. L.*, (1893) 163n². **Foron**: 1816, Treaty between Sardinia and Geneva, by which the river Foron was ceded to Geneva; Hall, *Int. Law*, 6 ed. (1909) 124. **Netze**: 1773, river Netze, ceded by Poland to Prussia. Grantee successfully claimed that cession of the stream should be construed to include the shores; Hall, *Int. Law*, 6 ed. (1909) 124; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 238. **Oder**: 1648, by Treaty of Osnabruck, the Empire ceded the river Oder to Sweden, which was construed to vest territory extending two German miles from the bank; Hall, *Int. Law*, 6 ed. (1909) 124; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 238. **Po**: Declared free Sept. 10, 1823. Navigation regulated by Treaty of Milan of 1849; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232; Walker, *Man. Int. L.*, (1895) 36. **Poland**: Rivers and banks of declared free in 1815, by Austria, Russia and Prussia; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 232. **Rhine**: Navigation of the river Rhine was declared free by treaties of Paris and Vienna, "Jusqu'à la mer." The Dutch Government contended that, notwithstanding these provisions, they had control over the mouth of the Rhine. The Rhine flows through several smaller rivers into the sea after its main channel ends. For a discussion of this point, which is a question of interpretation of the treaty, see 1

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Rivers

Phillimore, *Int. L.*, 3 ed. (1879-1888) 237. The controversy was adjusted by treaty of Mayence of March 31, 1831. Walker, *Science, Int. L.*, (1893) 163n², between the riparian states of the Rhine providing that outlets should be the Leek and the Waal. Various tolls abolished at Congress of Rastadt (1804); Hall, *Int. Law*, 6 ed. (1909) 136; 1 Halleck, *Int. L.*, 4 ed. (1908) 186; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 245, 252; Walker, *Man. Int. L.*, (1895) 35 et seq.; Wheaton, *Elements, Dana's ed.* (1866) 276-279. **Scheldt**: 1648, by Treaty of Munster between seven United Provinces and Spain, the river was closed to the other ten provinces by Article 14. 1783, Emperor Joseph II. attempted to open it and failed. 1792, Scheldt and Meuse opened to vessels of all riparian states by decree of the French Convention dated Nov. 16, 1792, and made when the French overran Belgium. Stipulations of the Treaty of Vienna as to Scheldt were incorporated into Treaty of 1839 between United Netherlands and Belgium. Scheldt tolls redeemed by Treaty of Brussels of 1863. See 1 Halleck, *Int. L.*, 4 ed. (1908) 187; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 228-231; Walker, *Science, Int. L.*, (1893) 163n²; Walker, *Man. Int. L.*, (1895) 37; 1 Westlake, *Int. L.*, 2 ed. (1910) 148, 149; Wheaton, *Elements, Dana's ed.* (1866) 276. **Weser**: Declared free Sept. 10, 1823; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 232. **North American Rivers**: **Gulf of California** and river **Colorado**, Art. VI. of the Treaty of Guadalupe Hidalgo, of Feb. 2, 1848. "By the Treaty of Dec. 30, 1853, between the United States and Mexico, navigation is made free to vessels of the United States to and from their own territory, through the Colorado and the Gulf of California, and through the Mexican part of the Rio Grande below latitude 31° 47' 30";

Wheaton, *Elements, Dana's ed.* (1866) 288. **Columbia River**: Art. II. Treaty between United States and Great Britain of June 15, 1846; 1 Moore, *Dig. of Int. L.*, (1906) 638. **Hudson River**: An intrastate river not opened by United States to Canadian vessels; 1 Moore, *Dig. of Int. L.*, (1906) 626. **Mississippi**: By Peace of Paris, 1763, Great Britain acquired Canada from France and Florida from Spain. The line between British and French possessions extended through the middle of the Mississippi, and the free navigation was secured to British subjects. Spain afterwards became the owner of both banks of the lower part of the Mississippi, and therefore claimed the right to an exclusive navigation of the river below the southern boundary of the United States. By Treaty of Paris of 1783, between United States of America and Great Britain, it was provided in the 8th article that "The navigation of the river Mississippi, from its source to the ocean, should forever remain free and open to the subjects of Great Britain and the citizens of the United States." United States resisted the claim of Spain on (a) the articles in these treaties; (b) the general principles of international law. Dispute terminated by Treaty of San Lorenzo el Real (1795), which provided in the 4th article that the Mississippi should be opened to navigation by the citizens of the United States from its source to the ocean. United States acquired Louisiana by cession from France on April 30, 1803, and Florida by Treaty with Spain of Feb. 22, 1819. Moore, *Dig. of Int. L.*, (1906) Vol. 1, 625, says that the stipulation in favor of British subjects in Treaty of 1783 was inserted under a misapprehension, subsequently corrected, that the head waters of the Mississippi were in British territory; and was not renewed in Treaty of Ghent on Dec. 24, 1874. United

States of America consequently became the sole owner of the entire river; Hall, *Int. Law*, 6 ed. (1909) 132; 1 Halleck, *Int. L.*, 4 ed. (1908) 188; Hershey, *Int. L.*, (1912) 208n; 1 Moore, *Dig. of Int. L.*, (1906) 623 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 240 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 81; 1 Westlake, *Int. L.*, 2 ed. (1910) 154; Wheaton, *Elements*, Dana's ed. (1866) 279-283. Treaty between United States and Great Britain Jan. 11, 1909, respecting boundary waters of United States and Canada. **Rio Grande River**: 1 Moore, *Dig. of Int. L.*, (1906) 639. **St. Lawrence**: By Treaty of June 5, 1854, agreement was made between United States and Great Britain as to joint use of. This was terminated by the President in pursuance of a resolution of the Congress of January 18, 1865. Treaty of Washington of May 8, 1871. Art. XXVI. Navigation of British portion of St. Lawrence was open "forever" to citizens of the United States; Hall, *Int. Law*, 6 ed. (1909) 133; 1 Halleck, *Int. L.*, 4 ed. (1908) 188, 189; Hershey, *Int. L.*, (1912) 208n; 1 Moore, *Dig. of Int. L.*, (1906) 631; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 242 et seq.; Snow Cases, (1893) 35 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 283-287. **South American Rivers**: Republic of Uruguay, by decree of 1853, opened its internal waters to foreign commerce; Hall, *Int. Law*, 6 ed. (1909) 138; Woolsey, *Int. L.*, 6 ed. (1897) 82. The Amazons partly opened by Brazil in 1851 to co-riparian state of Peru, and in 1867 Brazil, by decree, admitted all foreign vessels to navigation of the **Amazon**, the **Tocantins** and the **San Francisco**; Hall, *Int. Law*, 6 ed. (1909) 138; 1 Moore, *Dig. of Int. L.*, (1906) 640-648. Rivers of Argentine Confederation closed to foreign ships until 1853, when the **Panama** and **Paraguay** (within Argentine territory) were open for internal trade to commercial

ships of all nations by treaties made between the Confederation and Great Britain, France and the United States; Hall, *Int. Law*, 6 ed. (1909) 138; Woolsey, *Int. L.*, 6 ed. (1897) 82; Walker, *Man. Int. L.*, (1895) 36. (1857) Brazil, by Treaty with Argentine Confederation; the navigation of those portions of both rivers as well as part of the **Uruguay** belonging to the two countries, declared free except for local traffic, but navigation of their affluents was expressly reserved; Hall, *Int. Law*, 6 ed. (1909) 138. 1903, Venezuelan boundary dispute arbitration court decided in favor of free navigation for merchantmen of all nations on the rivers **Amakomon** and **Barima**. **La Plata, Parana, Paraguay and Uruguay**: 1 Moore, *Dig. of Int. L.*, (1906) 640. **The Orinoco**: 1 Moore, *Dig. of Int. L.*, (1906) 649. The **Uruguay and Parana** open to all merchant vessels by Treaty of July 10, 1858, between United States and Argentine Confederation, and Treaty of May 12, 1858, between United States and Bolivia; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 246. Nov. 26, 1858, **Ecuador** declared her rivers open to free navigation; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 246. Republic of Paraguay appropriated the river **Paraguay** between the territory of the republic and **Gran Chaco**, and maintained it until after its war with Brazil and the Argentine Confederation; Hall, *Int. Law*, 6 ed. (1909) 124n¹; 1 Westlake, *Int. L.*, 2 ed. (1910) 158. **African Rivers**: Feb. 26, 1885, the Congo Conference at Berlin stipulated free navigation on rivers Congo and Niger and through tributaries, creating International River Commission for the regulation of navigation of these rivers; Hershey, *Int. L.*, (1912) 208n; Walker, *Man. Int. L.*, (1895) 36, 37; 1 Westlake, *Int. L.*, 2 ed. (1910) 158. See Resolutions of the Institute of International Law, at meeting of

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Lakes

Lakes.

§232. Lakes are bodies of water which may or may not be connected with the open sea. In this case where one state owns all the territory around the water, it is perfectly obvious that no other state can have any jurisdiction therein. Where the territory of several states abuts on such a body, there must be an adjustment of the conflict of the jurisdiction between the two states. Where the body of water, as in the case of the Great Lakes of North America, is large in extent and the maritime belt cannot possibly appropriate the whole surface of the water, the case seems to be similar to that of the open sea.¹⁷ Where the lake is connected with the open sea by a navigable stream, the same principles apply as have already been referred to in the case of rivers. Some of the principal lakes are referred to in the note.¹

1883, Carnegie Ed., 63. **Asiatic Rivers:** 1862, Modified access to the **Yangtse-Kiang** conferred upon British shipping, gradually extended to other powers under "most favored nation" clauses. 1898, Revised regulations of trade by which merchant vessels of the Treaty Powers were authorized to trade on the Yangtse-Kiang at eight treaty ports, and to land and ship goods in accordance with special conditions at five non-treaty ports; Hall, *Int. Law*, 6 ed. (1909) 139. 1888, Persia allowed the river **Karun** to be used under certain conditions; 1 Moore, *Dig. of Int. L.*, (1906) 652.

¹⁷ See Hershey, *Int. L.*, (1912) 203; Vattel, (1758) Chitty's Trans. Book I. §§275-277. "Lakes and landlocked seas surrounded by the territory of several states and at the same time navigable from the open sea are called 'international lakes' and 'landlocked seas.' International law, however, has not recognized the principle of free navigation on such lakes and seas;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 246.

¹ **Congo District**, lakes in: Free navigation on the lakes in the Congo District was permitted by Art. 15 of the General Act of the Congo Conference; 1 Oppenheim, *Int. L.*, 2 ed. (1912)

246n⁴. **Como Lake** is Italian. **Constance Lake**, surrounded by Germany (Baden, Württemberg, Bavaria), Austria, Switzerland (Thurgau and St. Gall); Martens, Summary, (1788) Cobbett's Trans. IV. IV. 9n; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 246. **Dead Sea** in Palestine was, in 1914, Turkish. **Great Lakes in North America:** **Lakes Superior, Huron, Erie and Ontario**, surrounded by United States and British Canada. Boundary line runs through the middle by treaty. Navigation regulated by Treaty of Washington of 1871; 1 Moore, *Dig. of Int. L.*, (1906) 670-698. "How the Great Lakes Became 'High Seas' and Their Status Viewed from the Standpoint of International Law," Harry E. Hunt; 4 Amer. J. Int. Law, 285 et seq. United States of America and Great Britain have by treaty regulated the warships which each may maintain upon the Great Lakes, and the navigation of all the waters thereof is perfectly free to all members of both states. **Lake Michigan** is entirely surrounded by territory of the United States of America. **Lake Geneva**, surrounded by Switzerland and France; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 246.

BOUNDARIES OF TERRITORY.

§233. The boundary of the territory of a state is the imaginary line on the surface of the earth which defines the limits of the jurisdiction of the state.² There is some confusion in the writers in discussing this subject of boundaries, and it is sometimes said that boundaries are natural³ and artificial. The boundary of a state is a purely imaginary line, and is marked on the surface of the earth sometimes by natural objects, as mountains and rivers; sometimes by artificial objects, as monuments, posts, etc. The boundary is the same in each case, but in one case is marked by artificial means, in the other by natural.⁴ Where the boundary between two states has not been surveyed and is described as following certain physical objects on the ground, there are a number of presumptions which apply.⁵ Where the boundary follows mountains or hollows, the

² According to Grotius, *Belli. ac. Pacis* (1625), Whewell's Trans. II. III. XVI. *limitatus* is land with an artificial boundary; *assignatus per univ. sitatum* is land determined by measured boundary, and *arcifinius* land defined by natural boundaries. Objections have been made to this classification. See Hershey, *Int. L.*, (1912) 174; 1 Moore, *Dig. of Int. L.*, (1906) 615; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 270. "Arcifinious States, so called because nothing so proper to distinguish jurisdiction, as that which is of such a nature that it is not easily passed over. Those whose territory admits of boundaries fit to keep the enemy out;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 215.

³ The phrase, "natural boundaries of a state," is sometimes used to mean those geographical limits which should, for one reason or another, mark the artificial boundary of a state, a meaning entirely too loose for the accurate thought of the international lawyer. The writers, however, apparently failed to distinguish this meaning of natural boundaries, e. g.—Hershey, *Int. L.*, (1912) 174, n.¹⁰. Louis XIV. proposed as the natural boundaries of France the Alps, Rhine, Pyrenees and Ocean. Former policy to consider rivers and

mountains as natural boundaries. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 240.

⁴ "The boundaries of state territory may consist either in arbitrary lines drawn from one definite natural or artificial point to another, or they may be defined by such natural features of a country as rivers or ranges of hills; Hall, *Int. Law*, 6 ed. (1909) 123. "Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 270. "The frontiers or boundaries of a state are usually classed as natural or physical, and artificial or conventional;" Hershey, *Int. L.*, (1912) 173. This statement shows the confusion in thought as to the nature of boundaries of a state, and there seems to be a slip of the pen because the phrase should read, "Natural or artificial, physical or conventional."

⁵ For some of the presumptions see Grotius, *Belli. ac. Pacis* (1625), Whewell's Trans. II. III. XVI.-XVIII.; Hershey, *Int. L.*, (1912) 174; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 270 et seq.; Snow Cases. (1893) 16.

§234

Increase and Decrease, Natural Causes

water divide is the boundary line. Where it follows a river, the middle of the river—except in the case of a navigable stream—is the boundary. In the case of a navigable stream the centre of the deepest channel or *thalweg*⁶ is the boundary. In the case of a lake, the line runs through the middle of the lake. All these are presumptions of fact, and may be overthrown by proof of another line.⁷

INCREASE AND DECREASE OF STATE TERRITORY BY NATURAL CAUSES
WHEN THE TERRITORY IS WASHED BY WATER.

§234. State territory may be increased or diminished by natural causes which can only arise by the action of water on state territory,

⁶ For etymology of *Thalweg* and meaning see 1 Westlake, *Int. L.*, 2 ed. (1913) 144, n¹.

⁷ A number of disputes have arisen as to boundaries which have usually been settled by arbitration. Nootka Sound dispute between Great Britain and Spain, settled by convention in 1790. See Wheaton, *Elements*, Dana's ed. (1866) 242, 243. Controversy between United States and Russia respecting Northwest coast of America, convention of 1824; Wheaton, *Elements*, Dana's ed. (1866) 243, 248. "Concerning the Alaskan Boundary," Charles Cheney Hyde, 16 *Harv. Law Rev.* 418, et seq. Between Great Britain and Russia respecting Northwest coast of America, convention of 1825; Wheaton, *Elements*, Dana's ed. (1866) 246. Oregon territory dispute between Great Britain and United States of America, negotiation of 1827. Conventions of 1818 and 1827. Treaty of Washington of 1846; award of German Emperor in 1872; 5 Moore, *Dig. of Int. L.*, (1906) 720 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 250 et seq.; Costa Rica and Panama dispute settled by convention of March 17, 1910, by the decision of the Chief Justice of the United States Supreme Court. For report of his decision, see 8 *Amer. J. Int. Law*, 913 et seq. April 11, 1908—Treaty of Washington

between Great Britain and the United States of America for defining boundary in the waters of Passamaquaddy Bay. For text, see 2 *American J. Int. L.*, Supp. 306 et seq. See 2 *Amer. J. Int. Law*, 634 et seq. Guano Islands dispute between United States of America and Venezuela, see Wheaton, *Elements*, Dana's ed. (1866) 255. Dispute between United States and Great Britain concerning the St. Croix River, see 1 Moore, *Int. Arbitration* (1898) 1-43. Islands in the Bay of Fundy, see *Ibid.* 1, 45-63. The Northeast Boundary, see *Ibid.* 1, 65 et seq.; 1 Moore, *Dig. of Int. L.*, (1906) 749-750. United States and Mexico; 1 Moore, *Dig. of Int. L.*, (1906) 753-766. Boundaries of Philippine Islands; 1 Moore, *Dig. of Int. L.*, (1906) 528 et seq. Samoan Islands; 1 Moore, *Dig. of Int. L.*, (1906) 536 et seq. United States and Spain over boundaries of Louisiana purchase in 1803; Hall, *Int. Law*, 6 ed. (1909) 107. Great Britain and Venezuela, controversy over 60,000 sq. mi. to the South of the Orinoco and West of the Mosquito Rivers; Hall, *Int. Law*, 6 ed. (1909) 111. "Boundaries. A Contribution to the Study of American International Law," (1911) Hugh D. Barbagelata. Translation by Charles G. Fenwick. See 6 *Amer. J. Int. Law*, 246.

whether a river or lake or open sea, or a portion thereof. The only case which requires our attention is where the water forms the boundary of the territory of a state. Alluvia are deposits of mud or sand formed in the slack water or overflow of streams, and the word seems to relate properly only to flood action. Accretion is the formation of land by the external action of water. Deltas or islands may be formed in any of these cases and there is a presumption, generally acted upon by the independent states of the world, that in any such case the land formed is part of the territory next to which it appears where the middle of the water forms the boundary between the states. Avulsion is the pulling off or tearing away by sudden forcible separation, and is distinguished from the case of alluvium and accretion in that the latter are gradual. Where the boundary is a fixed line irrespective of the course of the water in question, the accretions of the land belong to each state according to which side of the line they are formed on. Where a bed of a river belongs to two states, an island in mid-channel belongs one-half to each, and an island on one side of the channel belongs to the state owning the other side.⁸

Increase and Decrease of State Territory by Act of State.

PRELIMINARY.

§235. State territory may be acquired and transformed by act of the state itself.⁹ Two cases may arise, (A) where the territory acquired belongs to no state; (B) where it already belongs to another state. The latter case only involves a transfer, and the result is the increase in territory of one state and decrease in the territory of another.¹⁰ The discussion will be arranged under these two headings, with, however, a few preliminary remarks on the state act of acqui-

⁸ See Grotius, *Bell. ac. Pacis* (1625), Whewell's *Trans.* II. VIII. VIII.-XVII.; Hall, *Int. Law*, 6 ed. (1909) 121; Hershey, *Int. Law*, (1912) 179 et seq.; 1 Moore, *Dig. of Int. L.*, (1906) 269 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 299-302; Vattel, (1758) Chitty's *Trans.* Book I. §26 et seq.; Wilson & Tucker, *Int. L.*, (1901) 102. Accretion in the Rio Grande provided for by treaty; 1 Moore, *Dig. of Int. L.*, (1906) 747.

⁹ This is really a case of the transfer of the jurisdiction over territory, and not a transfer of the territory itself.

¹⁰ It is a mistake to emphasize acquisition when another state is involved. It is not acquisition only, but a transfer to which both are parties, and the subject should be discussed accordingly.

§236

State Act of Acquisition and Transfer

tion and transfer. Before passing to this, however, we may note that the only distinction between (A) and (B) lies in the facts antecedent to the setting up of the jurisdiction, a distinction of some importance to clear thinking, and which will be referred to again.¹¹ The writers generally say that a state has a right to acquire territory, in which they are using the word "right" in the sense of power.¹² A state has unquestioned full power to acquire any territory it pleases in any manner that it sees fit, the exercise of which power is restrained to a greater or less extent by the international factors of conduct.^{13*}

STATE ACT OF ACQUISITION AND TRANSFER.

§236. The act of acquisition or transfer is a state act, and the organ of government appropriate, as well as the exercise of the jurisdiction over the acquired territory, is a matter of municipal law which in a democracy, with a written constitution, sometimes causes difficulty. Among personal governments there was no such trouble. Territory grabbing was characteristic of the potentates of Europe, and the only question was how territory could in fact be acquired by force, fraud or otherwise, and the state territory lay in the free disposition of the monarch. It has remained for democracies to develop a hesitancy about territorial acquisition, and to impose restraints on the transfer of territory. The fear of imperialism and the example of Rome have strongly operated, although without success, against territorial acquisition in at least one modern democ-

¹¹ There is a one-sided view of the writers in discussing acquisition. Acquisition is an acquiring, which may be in several ways. We are concerned with the ways with respect to the territory, and what is an acquisition by one state is a loss by another. It seems as if the law of vendor and vendee for the purchase of real estate furnished many analogies. The methods of acquisition most commonly accepted at present are: (a) occupation; (b) prescription; (c) accretion; (d) conquest; (e) cession; Wilson, *Int. L.*, (1910) 79. The various methods of acquiring and losing territory as described by the writers are cession, occupation, accretion, subjugation, conquest, prescription, dereliction, operation of nature, as

earthquakes, etc., and revolt; Hershey, *Int. L.*, (1912) 179 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 281-284; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 191 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 328. Twiss, *L. of Nations, Peace*, 2 ed. (1884) 229, points out that the founding of a new state in a condition of political dependence, as a colony, constitutes as much an extension of state territory as the incorporation of a new state into a confederacy.

¹² 1 Halleck, *Int. L.*, 4 ed. (1908) 163, 164; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 192; Wheaton, *Elements*, Dana's ed. (1866) 238. See §115, ante, on rights in international relations.

^{13*} See §105, ante, on definition of international factors of conduct.

Increase, Decrease, by Act of State

§236

racy.¹³ The acquisition consists in establishing an interest in the territory and then exercising the jurisdiction of the state to protect that interest. A distinction is to be drawn between territory of no state and territory already belonging to another state. In the first case there is no displacement of another jurisdiction; in the latter the jurisdiction of the other state must be disposed of by force or with the consent of the latter. In each case, the actual acquisition or taking possession is the same, the only distinction being in the antecedent facts. A few references to state acts of acquisition are added in the note.¹⁴

¹³ In the United States of America, this feeling has been founded on a fear of imperialism, a fear that the acquisition of additional territory would lead to a change in the form of government and bring about the establishment of a monarchy and the destruction of popular liberty. The fear is well grounded, but the United States of America has in fact made enormous territorial acquisitions without so far involving any of the evil consequences predicted. It is too soon, however, to pass judgment on this question, as it will probably take several centuries for the poison of imperialism to corrupt the liberties of the republic. The historian of 3000 A. D. will be better able to speak on the question.

¹⁴ United States of America: 1898—Joint resolution providing for annexation of Hawaiian Islands to United States. See *Wilson, Int. L.*, (1910) 77n². See Act of Congress of February 14, 1909, relative to acquisition of Philippine Islands; *Wilson, Int. L.*, (1910) 84n¹⁶. Since the thirteen colonies at the time of the revolt against Great Britain claimed in their own several interests as insurgents all territory within the future United States subsequently wrested from British control, it follows that the United States of America could make no acquisition of territory under the revolution distinct from or independent of some or one of the states. *Johnson, J.*, in *Harcourt v. Gaillard*, 12 *Wheat.* 523

at 525 (1827). As to the United States of America taking possession of the Virgin Islands, see executive order of the President of the United States of Dec. 26, 1917; 11 *American J. Int. L.*, Supp. 53. Baldwin, Simeon E.—"Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory;" 12 *Harv. Law Rev.*, 393 et seq. Coudert, Frederic R., Jr.—"Our New Peoples, Citizens, Subjects, Nationals or Aliens;" 3 *Col. Law Rev.*, 13 et seq. Fuller, Paul.—"Some Constitutional Questions Suggested by Recent Acquisition;" 1 *Col. Law Rev.*, 109 et seq. Littlefield, Charles E.—"The Insular Cases;" 15 *Harv. Law Rev.*, 169 et seq., 281 et seq. Langdell, C. C.—"The Status of our New Territories;" 12 *Harv. Law Rev.*, 365 et seq. Lowell, A. Lawrence.—"The Status of our New Possessions;" 13 *Harv. Law Rev.*, 155 et seq. McClain, Emlen.—"The Hawaiian Case;" 17 *Harv. Law Rev.*, 386 et seq. Palfrey, John Gorham.—"Growth of the Idea of Annexation and its bearing upon Constitutional Law;" 13 *Harv. Law Rev.*, 371 et seq. Randolph, Carman F.—"Constitutional Aspects of Annexation;" 12 *Harv. Law Rev.*, 291, et seq. Randolph, Carman F.—"The Law and Policy of Annexation, 1901," 14 *Harv. Law Rev.*, 630; 1 *Col. Law Rev.*, 335 et seq. Randolph, Carman F.—"The Insular Cases;" 1 *Col. Law Rev.*, 436 et seq.

The act of acquisition may be divided into two distinct elements (A) the setting up of the jurisdiction of the state in the territory; (B) as preliminary thereto the disposing of any antecedent facts which are an obstacle to such setting up.¹⁶ The only fact which is an obstacle is the existence of the jurisdiction of another state in the territory, which jurisdiction may be removed by force or by agreement. The transfer is the act of the state whose jurisdiction is removed from the territory, and we may conveniently, therefore, classify transfers as voluntary and involuntary. Such transfer involves a complete ouster of the jurisdiction of one state and a substitution of that of another. The transfer, so far as international law is concerned, is only of the exclusive jurisdiction which is independent of municipal law upon which it has no effect unless a change is made by the states making the transfer. Since, therefore, exclusive jurisdiction is a fact it follows that such fact must be established. When the territory belongs to no state, it is necessary only to establish the jurisdiction in fact. When the territory belongs to another state, the transfer involves the displacement of the jurisdiction of one and the establishment of the jurisdiction of another.

Snow, Alpheus E.—“The Administration of Dependencies,” (1902). Thayer, James Bradley.—“Our New Possessions,” 12 *Harv. Law Rev.*, 464 et seq. Thayer, James Bradley.—“Insular Tariff Cases in the Supreme Court,” 15 *Harv. Law Rev.*, 164 et seq. Whitney, Edward B.—“Insular Decisions of 1901,” 2 *Col. Law Rev.*, 79 et seq. According to the law of Great Britain, conquered territory immediately forms part of the king's dominions; 1 Wildman, *Int. L.*, (1849) 162. “Thus when in 1883 the Ministry of the British Colony of Queensland endeavored to annex on their own authority the greater part of the island of New Guinea, together with New Britain, New Ireland, and a large number of other islands off the north coast of Australia from longitude 141 degrees to longitude 155 degrees, the home government refused ratification of so sweeping an act. All it would consent to do was to add to the Empire a large portion of the southeast of New Guinea.

This was done in 1884, and at the end of that year Germany annexed another portion, and established a protectorate over the islands of New Britain and New Ireland, which had been discovered by Dampier, a great British navigator, in 1699, and nominally taken possession of for Great Britain in 1767 by Captain Cartaret of the Royal Navy. His act was, however, never ratified, and consequently it had no validity, though he bore the commission of King George III.;” Lawrence, *Int. Law*, 5 ed. (1913) 152, 153. As to Roman method of annexation, see Zouche, *L. of Nations* (1650), Carnegie ed., Part I. VII. 2. 1386, Poles, by election of Duke Jagello, united Lithuania with their own kingdom. Cited by 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 382, as a case of an election, indirectly the cause of acquiring territory.

¹⁶ Lawrence, *Int. Law*, 5 ed. (1913) 152, says that effective international occupation is made up of two inseparable elements, annexation and settlement.

Acquisition of Territory Not Belonging to Any State

PRELIMINARY.

§237. The acquisition of territory not belonging to any state is of little importance today, as the unoccupied territory left in the world is small in extent, mostly inaccessible and of little value. None of it is worth the expense of war.¹⁶

The setting up of jurisdiction in the territory of no state is a fact. The controversies which have arisen have been controversies of fact, and while voluminous and extensive, are of subordinate legal importance. We shall therefore dismiss the subject with less comment than is usual among the writers.

METHOD OF ACQUISITION OF TERRITORY NOT BELONGING TO ANY STATE—DISCOVERY AND OCCUPATION.

§238. Territory not belonging to any state is acquired by setting up the jurisdiction of the state therein, which is a state act and presents solely a question of fact. It is usual, therefore, to describe the act as an act of occupation, which is strictly accurate, but some writers seem to limit the use of the word to the case where the jurisdiction is set up in territory of no state,¹⁷ thus overlooking the circumstance that it accurately describes the setting up of the jurisdiction, irrespective of whether there is a displacement of the jurisdiction

¹⁶ The continents of North America and South America were prizes for which blood and money were freely spent, and if such a region were open to similar appropriation at the present day, there is little doubt but that the world would witness a struggle for its possession as gigantic and bloody as the war of German aggression, 1914-18. The more peaceful settlement of Africa has no doubt been a large part the result of economic and geographic conditions. The African continent does not present so rich a prize to the colonist as North and South America. There is in this continent, owing to the absence of harbors and rivers, very little opportunity for separate settlements, and the great heat and unhealthiness of the climate have dampened the

ardor of the white man in no very inconsiderable degree. *The Arctic and Antarctic Regions*: Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 292n⁴, says: "North Pole cannot be a region of occupation because not land." "The Arctic and Antarctic Regions and the Law of Nations," Thomas Willing Balch; 4 Amer. J. Int. Law, 265 et seq. "Arctic Exploration and International Law," James Brown Scott; 3 Amer. J. Int. Law, 928 et seq.

¹⁷ "Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State;" 1 Oppenheim, Int. L., 2 ed. (1912) 291.

§238

Discovery, Occupation

of another state or not.¹⁸ If the land is previously unknown, the act of occupancy must necessarily be preceded by discovery either by the occupying state or by someone else. If the land is already known, it may be acquired by occupation in the same manner irrespective of who made the discovery. The discovery¹ is therefore unimportant from a legal point of view but must always precede the occupation.² An occupation must obviously be of such a character as to present an existing fact to any other state seeking to introduce its jurisdiction upon the same land. This act of occupation is generally indicated by hoisting the flag of the country, firing guns, etc., and formally taking possession, which may be by a private individual or by a state official. If by an individual, it is obviously not a state act, but may be adopted and ratified subsequently by the state.^{2*}

This fact of occupation goes back to the very beginning of fixed territorial jurisdiction; to the time when the various tribes of men passed from the nomad to the agricultural state, prior to which time there was perhaps a sort of occupation consonant with the use of the earth's surface then known. Hunting grounds may have been marked off and such seems to have been the case of the North American Indians at the time of the discovery of America. The fact of occupation must be as old as man and it is not likely that there has been much change in the conception which has been formed of that occupation any more than there has been of the fact of the possession of real or personal property among individuals.³ Since all juris-

¹⁸ See §766, post, on belligerent occupation.

¹ As to discovery, see Hall, *Int. Law*, 6 ed. (1909) 102; Hershey, *Int. L.*, (1912) 186; 1 Moore, *Dig. of Int. L.*, (1906) 258; 1 Oppenheim, *Int. L.*, 2 ed (1912) 294; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 197, 201 et seq.; Vattel, (1758) Chitty's *Trans. Book I.* §207; 1 Westlake, *Int. L.*, 2 ed. (1910) 101 et seq. See Acts of Congress protecting members of the United States of America discoverers of Guano Islands; Wheaton, *Elements*, Dana's ed. (1866) 255n.

² There was no question of discovery involved when the Venetians set up their state by act of occupation on the shores of the Adriatic, or when the

Norman knights set up the state of Sicily.

^{2*} See §73, ante, on distinction between state act and individual act.

³ See as to occupancy; Hall, *Int. Law*, 6 ed. (1909) 101 et seq.; Hershey, *Int. L.*, (1912) 185 et seq.; Lawrence, *Int. Law*, 5 ed. (1913) 148; Manning, *Int. L.*, 2 ed. Amos. (1875) 116; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 294-297; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 330 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 196-224; Vattel, (1758) Chitty's *Trans. Book I.* §§203-210; Walker, *Science Int. L.*, (1893) 347 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 98. See Resolutions of the Institute of International Law, at meeting of 1888, *Carnegie Ed.*, 86.

diction originally was roving and man has progressed from a nomad state, it follows that the beginning of the territorial jurisdiction of all state territory was by occupation, and as the world has become fully occupied, the transfer of state territory is from one state to another. Therefore, all state jurisdictions and also all definite state territory begins with occupation of land not belonging to any state, and such land so occupied remains in the possession of that state until it is transferred to another state.

The circumstance that the land is occupied by barbarian states has been considered of no importance until very recent times.⁴ Indeed, in the middle ages, the Christian states of Europe fortified themselves with the idea that it was a matter of religious duty to impose their beliefs and civilization upon barbarian and infidel people, and the incidental profit to themselves was persuasive evidence of the righteousness of their acts. Even today a native population would have difficulty in making its voice heard in the great arena of international life when protesting against an occupation of its territory by a civilized and powerful state. Some of the facts as to occupation in the 15th century are referred to in the note.⁵

⁴ See §248, post, on barbarous tribes as parties to a transfer. See §48, ante, on barbarous tribes as international persons.

⁵ Jan. 8, 1454, Bull issued by Pope Nicholas V. gave the Empire of Guiana to the Crown of Portugal, with power of subjugation and prohibiting access of all other nations thereto. Leibnitii Codex Juris Gent. Diplomat 165. 1493—Bull issued by Alexander VI., in which he granted to the United Crowns of Castile and Arragon all lands discovered and to be discovered beyond a line drawn from pole to pole one hundred leagues West of the Azores, excepting all land previously occupied by any other Christian nation. For extract from the text, see Vattel, (1758) Chitty's Trans. Book I. §208n, citing Leibnitii Codex Juris Gent. Diplomat 203. 1494—Portugal protested the position of the line drawn by the Papal Bull, and at a conference between Spain and Portugal in 1494, [the

Treaty of Tordesillas in 1494, between Spain and Portugal, confirmed by Pope Julius II. in 1506] the line was shifted by common consent 370 leagues West of the Islands approximately where the fiftieth west meridian now runs; Vreeland, Grotius, (1917) 45. Westlake, Int. L., 2 ed. (1910) Vol. 1, 96, says that Papal Grants were made by the Popes claiming as masters of the world by divine right. Disregarded by Great Britain, France and Holland; 1 Phillimore, Int. L., 3 ed. (1879-1888) 332. May 5, 1496—Patent of Henry VII. of England to John Cabot and his sons authorized them "to seek out and discover all islands, regions and provinces whatsoever that may belong to heathens and individuals," and to subdue, occupy and possess these territories as his vassals and lieutenants; 1 Phillimore, Int. L., 3 ed. (1879-1888) 349; 1 Westlake, Int. L., 2 ed. (1910) 97; Wheaton, Elements, Dana's ed. (1866) 241. Patent of Queen Elizabeth

Questions will arise as to the extent of the occupation,⁶ that is, as to what acts are necessary to indicate occupation of a certain territory. It is obvious that in the case of a wild and unsettled country, it is impossible for a state to immediately fully occupy all the land domain, and questions therefore have arisen as to whether the occupation of the mouth of a river extends all the way up to the source of the river, and whether the occupation of a seacoast includes occupation of the back country, etc. Thus we have hinterland, spheres of influence, watershed, back country, middle distance, as describing the various extents of the occupation.⁷

The case of occupation of unoccupied territory is not of very great importance in the world today because there is so little territory left

to Sir Humphrey Gilbert empowered him "to discover such remote heathen and barbarous lands, countries and territories not actually possessed by any Christian prince or people, and to hold, occupy and enjoy the same, with all their commodities, jurisdictions and royalties," Wheaton, *Elements*, Dana's ed. (1866) 242. Francis I. of France likewise disregarded the Bull; 1 Westlake, *Int. L.*, 2 ed. (1910) 97.

⁶ Hall, *Int. Law*, 6 ed. (1909) 104, 129-131; Hershey, *Int. L.*, (1912) 187, 191, 192; Lawrence, *Int. Law*, 5 ed. (1913) 155-157, 173; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 295-297; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 337-341; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 214; 1 Westlake, *Int. L.*, 2 ed. (1910) 113 et seq., 130 et seq., 141 et seq.; Wilson, *Int. L.*, (1910) 81. Great Britain has concluded treaties regarding spheres of influence, with Portugal, 1890, Italy, 1891, Germany, 1886, 1890, France, 1898; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 297.

⁷ African Conference of Berlin of 1885, by Arts. 34 and 35 of its General Act, laid down certain rules as to acquisition of territory on the coast of Africa. For translation of text see Hall, *Int. Law*, 6 ed. (1909) 115, from which it appears that eleven notices have been given under its provisions.

See 1 Halleck, *Int. L.*, 4 ed. (1908) 175n¹; 1 Westlake, *Int. L.*, 2 ed. (1910) 106 et seq. For translation of text see Wilson, *Int. L.*, (1910) 80. "France, on taking possession of the Comino Islands, and England, with regard to Bechuana Land, have already made notifications which are not obligatory under the Berlin Declaration. These notifications were, however, evidently made from motives of convenience and not with a view to establishing a principle; France having placed upon record the reservations mentioned above, and England not having notified at a later date her assumption of a protectorate over the Island of Socotra;" Hall, *Int. Law*, 6 ed. (1909) 116n¹. The occupation of Africa has been regulated by a number of other conferences and treaties as follows: 1890, Anglo-German agreement; 1890, Anglo-French agreement; 1891, Anglo-Portuguese agreement; 1899, Anglo-French agreement, Fashoda incident; 1904, Anglo-French agreement as to Egypt and Morocco; 1906, Algeiras Conference, Agadir incident, Morocco question. "The Partition of Africa," by J. Scott Keltie, 2nd ed., 1895. "Map of Africa by Treaty," Sir Edward Hertslet, 3 ed., 1909 to end 1908.

to be occupied, and is therefore mainly of historic interest.⁸ We have had in the history of the world a number of instances of conquests and invasions where one set of people invades the territory of another, conquers, subdues and settles upon the land. The invasions, prior to the middle ages, of western Europe were too rude and barbaric to furnish any instances of orderly conduct. The question of international law began with the conquest and occupation of America, and at this time the various states of Europe were reaching out for fresh territory, and the occupation of various lands in the new world of North and South America were the occasions of many bloody wars, and the only rule deducible from the proceedings of the time is that occupation was only good when maintained by force, that is, that every state actually had jurisdiction over the land which it occupied, and which jurisdiction it could maintain with force of arms.⁹

Transfer of Territory Belonging to Another State.

PRELIMINARY.

§239. Territory may be transferred from one state to another, which is a loss of territory by one of the states and an acquisition by the other. The case of a merger or separation of a state is to be distinguished, which is, in a measure, a transfer of territory because

⁸ For discussion of ancient cases see Zouche, *L. of Nations* (1650), Carnegie ed., Part II. III. 4.

⁹ The question of what amounts to an occupation has arisen in a number of instances and is simply a question of fact, *e. g.*—as to occupation by the United States of America in the Oregon dispute with Great Britain; Hall, *Int. Law*, 6 ed. (1909) 109–111; Maine, *Int. L.*, (1888) 69; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 332–351; 1 Westlake, *Int. L.*, 2 ed. (1910) 102; Wheaton, *Elements*, Dana's ed. (1866) 250–255. Claim of Venezuela in dispute with Great Britain; Hall, *Int. Law*, 6 ed. (1909) 111 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 103. As to occupation of the Falkland Islands, see 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 349, 350; 1 Westlake, *Int. L.*,

2 ed. (1910) 119. Dispute between United States of America and Spain as to boundaries of Louisiana, see Hall, *Int. Law*, 6 ed. (1909) 107–109. March 5, 1885, the governments of Great Britain and Germany, by convention, recognized the sovereignty of Spain "over the places effectually occupied as well as over those places not yet occupied, of the Archipelago of Sulu." (Ceded to United States in 1898 by the Treaty of Paris); Hall, *Int. Law*, 6 ed. (1909) 116n¹. Dispute between Great Britain and Portugal over Delagoa Bay; Hall, *Int. Law*, 6 ed. (1909) 118. Russia and United States of America over Northwest Coast of America; Wheaton, *Elements*, Dana's ed. (1866) 243–250. Great Britain and Spain over Nootka Sound; Wheaton, *Elements*, Dana's ed. (1866) 242.

by the merger the territory of the merging state becomes part of the state into which it is merged, and where a state appears in international life, there is a transfer of territory from the state of which it was formerly a part. But notwithstanding the fact that there is, in this case, a transfer of territory, the aspect as a transfer of territory is entirely lost in its more important and larger aspect as the birth or extinction of a state.¹⁰ In the case of a transfer which we are discussing the territory is conveyed from one state to the other, and the two states remain in their international aspect just as they were before.

Several cases may arise: (A) Conquest of territory, involuntary alienation, (a) followed by treaty of cession ratifying the conquest; (b) without being followed by any treaty. (B) Belligerent occupation from which the invader withdraws on or before the treaty of peace. (C) Voluntary transfer by treaty of cession, followed by the actual transfer of the territory. In (A) the possession precedes the treaty of cession; in (B) possession is taken and abandoned; in (C) the cession precedes the taking of possession. We shall discuss these cases together under the various headings which will arise. We have to consider (A) the alienability of state territory; (B) the cases of involuntary and voluntary transfer; (C) the act of transfer; (D) effect of the transfer on the territory transferred and its inhabitants; and (E) the operation of prescription.¹¹

¹⁰ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 281, 282.

¹¹ Hall, *Int. Law*, 6 ed. (1909) 116, says that when territory is definitely abandoned for any cause, the so-called right of possession is lost and it is open to occupation by other states than that which originally occupied it. Why, however, may not the original state re-occupy? Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 90 et seq., draws a distinction between titles in old and new countries, and says (a) in municipal law the title to land of an individual is derived from an already existing title or by adverse possession, and there is no concern with the origin of property, (b) that in old countries, the title of the state is of the same character as to origin, in which respect no distinction is to be drawn between states of differ-

ent civilizations. (In this the learned author overlooks the origin of Venice, which was by conquest and occupation; and the origin of Sicily and the Kingdom of Naples.) (c) That the new countries referred to are those in which there is no government capable of assuming the responsibility of international life, even to a limited extent, under a capitulation, as Turkey or China, and in which, therefore, a state will have to be established involving anew the question of the origin of territorial sovereignty, citing the conquest of America and Africa. But this question is no more involved than in the cases referred to in Europe. It is simply a question of historical perspective. Furthermore, the aborigines or savages existing in these so-called new countries constitute as true a state as

There is a certain confusion in the writers as to the facts of voluntary and involuntary transfer, which will be referred to at various points.¹² A part of the difficulty has arisen from the ambiguity of the word cession. The writers differ in their definitions, and leave it in doubt whether they mean the agreement for the transfer, or the act of the transferring state in handing over the possession.

ALIENABILITY OF STATE TERRITORY.

§240. There is no international restraint on the alienability of state territory, whether voluntary or involuntary.¹³ This follows from the political independence of states and the absence of any superior political power constraining their conduct. Any restraint of municipal law on the organs of state government as to their power or capacity to alienate the state territory can have no international effect.¹⁴ If a transfer is made in violation of such restriction, the transferee state obviously may keep the territory unless the transferor state is able to undo the transaction by setting in motion some

the bodies which displaced them [see §48, ante]; the only difference is in civilization and power. The contempt with which such inhabitants were regarded and the tendency to look upon them as not having the attributes of a state proceeded from the narrow prejudice of the medieval mind of Western Europe, for which there is no room in the realm of modern scholarship.

¹² As to cession, see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 286, 287; 1 Moore, *Dig. of Int. L.*, (1906) 281; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 224; Wilson, *Int. L.*, (1910) 83.

¹³ Grotius, *Belli, ac. Pacis* (1625), Whewell's *Trans.* II. VI. III.; Vattel, (1758) Chitty's *Trans.* Book I. §257. "As far as the law of nations is concerned, every state as a rule can cede a part or all of its territory to another;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 286. Woolsey, *Int. L.*, 6 ed. (1897) 63, misapprehends the point when he says:

"A state's territorial right gives no power to the ruler to alienate a part of the territory in the way of barter or sale as was done in feudal times." The restriction is a matter of municipal law. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 238, says that boundary waters are not a real exception to (inalienability) since they may wholly belong to one of the riparian states and may therefore be transferred from one riparian state to the other without the bank itself. Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 9, says a sovereign prince is incompetent to alienate any part of his realms.

¹⁴ Halleck, *Int. L.* 4 ed. (1908) Vol. 1, 164, says: A state has the same absolute right to dispose of its territorial or other public property as it has to acquire, but that it depends on the municipal law how and by what organ of the government the disposition shall be made.

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one or more of the international factors of conduct.¹⁵ The similar case in municipal life affords no analogy because there, if the restraint is of such a nature as to create a defect in the title, that defect can be set up in appropriate proceedings under the political power of the state, which political power does not exist in international life.

The notion has been advanced that certain appurtenances of state territory, as air and subsoil and marginal waters, are inseparable appurtenances of the land, and therefore inalienable.¹⁶ The notion is believed to be without weight. The unlimited power of a state over its territory obviously enables it to make any transfer, in whole or in part, that it sees fit, and which can in fact be made. It is perfectly competent, therefore, for the state to transfer the jurisdiction of its maritime belt of a lake or a landlocked sea within its territory, or of the air or subsoil. The river may continue to flow although another state has exclusive jurisdiction over it. The jurisdiction is a condition which may or may not exist, and may be altered without any effect on the physical structure of the surface of the earth.

¹⁵ Municipal law as to alienation: Francis I. of France attempted by treaty of Madrid to cede the Province of Burgundy to Emperor Charles V., but the States General, under the Constitution of the Old French monarchy, declared that the King had no authority to alienate any part of the kingdom by a treaty of peace, and the cession was annulled; 1 Halleck, *Int. L.*, 4 ed. (1908) 329; Vattel, (1758) Chitty's *Trans. Book I.* §264. The Constitution of France was subsequently changed and the power concentrated in hands of king, 1 Halleck, *Int. L.*, 4 ed. (1908) 329, 330, until the Revolution of 1789. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 165, says a transfer contrary to municipal law is invalid. The subject discussed by Vattel, (1758) Chitty's *Trans. Book I.* §261, where he says: "It is seldom disputed that an entire nation may alien what belongs to itself, but it is asked whether its conductor, its sovereign, has this power." Oppenheim, *Int. L.*, 2 ed.

(1912) Vol. 1, 285, says: "If a treaty of cession violates the municipal law, the treaty is not binding." See §386, post, on *ultra vires* treaties.

¹⁶ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 238, 256n², 286. In the municipal law, cases of a conveyance of mining rights separate from the surface are of such frequent occurrence that it is difficult to see how anyone could have supposed that the subsoil under state territory was for any reason inalienable and an inseparable appurtenance of the land. Inconvenience is the only argument which may, however, be disregarded if any state sees fit. There is nothing whatever to prevent Switzerland from conveying the Lake of Geneva to France. Such a transaction would be improbable and inconvenient, but there is no principle of international law which forbids it. He probably has in mind the unquestioned fact that the water cannot be in fact separated from the land.

INVOLUNTARY TRANSFER OF STATE TERRITORY.

§241. An involuntary transfer¹ occurs against the will of the transferring state as the result of pressure applied by the state receiving the transfer or by a third state, and the pressure may be exerted by forcibly taking possession of the territory or by diplomacy backed by force. A voluntary transfer is made without the application of force. It is often impossible to ascertain, owing to the complicated web of international intrigue, whether a particular cession is voluntary or involuntary. At the conclusion of a war, when the parties come to the making of the treaty of peace, each will endeavor to obtain the best terms for itself, and cession of a particular territory may be thrown in as a make-weight or to bind the bargain, in which case it would take more the aspect of a voluntary than of an involuntary transfer.²

Moreover, since there is no superior political power to relieve against the operation of duress in international life,³ and since the application of force is one of the factors of external conduct, it follows that there is no distinction in international law between voluntary and involuntary transfer,^{3*} even if the distinction could always be accurately drawn in fact. It is, however, entirely inadmissible to say that by fiction an involuntary transfer is regarded as voluntary.⁴ The statement implies that an involuntary transfer has in fact a different aspect, which is not the case in fact or in international law, whatever it may be in ethics. An involuntary transfer of territory usually takes the form of a seizure of the territory by military force, but that fact is totally immaterial to the present discussion. The writers, however, often speak of such a transfer as a conquest, and by so doing involve themselves in an ambiguity because a con

¹ Cases where one person compels another to transfer to a third person are rare in municipal life, but of frequent occurrence in the international world. See §257, post, on third states and transfer.

² It has been stated that such was the case with respect to the transfer by Spain to the United States of America of the Philippine Islands at the conclusion of the Spanish-American War of 1898. The islands were said to have been thrown in to escape the payment of an indemnity. They were therefore

practically purchased by the United States.

³ See §382 et seq., post, on duress as an excuse for refusing to perform a treaty.

^{3*} 1 Wildman, *Int. L.*, (1849) 57.

⁴ Hershey, *Int. L.*, (1912) 182, says: There is a legal fiction that all cessions are voluntary, whether brought about by conquest or by more peaceable means, and that "from a legal standpoint, cessions may be said to be with or without consideration."

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quest may be temporary during a war and not result in a transfer of the territory at all.⁵ The notion has been advanced of a right of conquest⁶ in which the word "right" is used in the sense of power. Every state clearly has the power to take any territory it can by force or otherwise, and the only question is how far the exercise of that power is restrained by the international factors of conduct,⁷ the principal one of which in this connection is the exercise of force by the state whose territory is or is about to be seized. It must be confessed that up to the present time these factors have not operated with much effect to restrain such taking of territory. The attempt to incorporate the principles of municipal law has led to another confusion and given rise to the supposition that there is no title by forcible seizure unless the state whose territory is seized has consented thereto by a treaty of cession.⁸ The only merit in the supposition lies in the fact that the treaty of cession indicates that the state forcibly dispossessed has given up any immediate attempt to retake the territory, which does make the possession of the aggressor more secure. Such consent, however, is obviously forced and cannot lend strength to a jurisdiction which has already asserted itself prior to the giving of the consent. A few instances of forcible seizure are referred to in the note.⁹

⁵ See §§767, 830, post, on belligerent occupation.

⁶ Hall, *Int. Law*, 6 ed. (1909) 560 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 21, says nations in fact accept if they do not justify such a right of conquest. See §808, post, on seizure of public property in war. The war of German aggression, 1914-18, however, seems to indicate that the restraint on forcible seizure in international life is stronger than it has ever been before.

⁷ For definition of, see §105, ante.

⁸ Manning, *Int. L.*, 2 ed. Amos. (1875) 116; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 226, 227; Vattel, (1758) Chitty's Trans. Book III. §197, says that the property becomes stable and complete only by treaty of peace or the entire submission and extinction of the state to which the occupied territory belonged. Others recognize that no such treaty is necessary; Hershey, *Int.*

L., (1912) 182; 2 Halleck, *Int. L.*, 4 ed. (1908) 501; Lawrence, *Int. Law*, 5 ed. (1913) 166. Maine, *Int. L.*, (1888) 178, says it is difficult in fact to find any territory held by conquest without a treaty, but that Lower Burmah in India was annexed after conquest by Great Britain and no treaty of cession ever signed. See §832, post, on belligerent occupation.

⁹ 1814—Prussia conquered portion of the dominion of Saxony; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 387. 1866—Prussia conquered Hanover. 1871—Germany conquered Alsace-Lorraine from France. 1893—Peru was forced to cede territory rich in guano and nitrate to Chile, and a question arose as to the apportionment of the debt. 1900-01—Orange Free State and South African Republic conquered by Great Britain. 1918—Alsace-Lorraine conquered from Germany by the allies.

Voluntary Transfer.

PRELIMINARY DESCRIPTION AND FORM.

§242. A voluntary transfer takes place with the consent of the transferring state, and usually takes the form of a bilateral executory agreement drawn up in the form of a treaty similar in some respects to a contract of sale between vendor and vendee in the municipal world. A voluntary cession may appear as a unilateral transaction, but no such case has been noted by the author. The treaty may be in the form of a promise to cede the territory or may directly cede it by words in *praesenti*. In other words, there must be a change of the international possession to complete the transaction, which involves a handing over of the territory by some formal act, or a mere abandonment by the transferring state. The current definitions of cession leave¹⁰ open the question whether the word applies to the formal promise to transfer or to the actual transfer of the possession, which latter is usually referred to as a tradition. We have several elements to consider which are not always clearly distinguished by the writers.¹¹ The cession is the actual handing over of the jurisdiction, which may be preceded by a treaty between the parties or by some unilateral act on the part of the transferring state or may be accomplished without any such preliminary act, and the transfer ratified by a subsequent agreement. The first is the peaceable method, and the second the case of conquest, for nearly all conquests are in fact ratified by the terms of the treaty of peace concluding the war in which the conquest was made.¹² There is

¹⁰ See §239n, ante. Questions will arise, in the case of cession, as to the extent of territory ceded and what movable property and private titles of the ceding government are comprised in a grant. This is simply a question of fact as to the terms of the cession. For instances see 1 Moore, Dig. of Int. L., (1906) 281 et seq.

¹¹ 1 Oppenheim, Int. L., 2 ed. (1912) 288; 1 Phillimore, Int. L., 3 ed. (1879-1888) 393. Where a treaty of peace contains a clause for the cession of territory, full sovereignty [jurisdiction] does not pass by the words of the treaty

without actual delivery; 1 Wildman, Int. L., (1849) 159. 1667, July 21—Treaty between Great Britain and France, Nova Scotia ceded to France. Act of cession made in consequence of the treaty not drawn up until February 1668; 1 Wildman, Int. L., (1849) 161. When Louisiana was ceded by the French to Spain in 1762, it passed by an act of cession drawn up in solemn form and dated more than a year after the treaty itself. See The Fama, 5 C. Rob. 97 (1804); 1 Wildman, Int. L., (1849) 161.

¹² See §241n⁷, ante.

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also the question of the necessity of consent by the inhabitants of the transferred territory in question. Some cases of transfer which have occurred are referred to in the note.¹³

¹³ Sales of State Territory: 1301—Theodoric, Landgrave of Thuringa, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdeburg, for 600 marks of silver. 1311—Margrave of Brandenburg sold Dantzic, Derschovia and Swiecae to Grand Master of the Teutonic Order for 10,000 marks. 1333—Sovereignty of the city and territory of Mechlin sold to the Earl of Flanders for 100,000 reals of gold, reserving fealty. 1333, about—John, of Luxemburg, sold city and county of Lucques to Philip of Valois for 180,000 florins. 1335, about—Duke of Silesia sold sovereignty of Frankenstein to King of Bohemia for 2,000 marks. 1479—Louis XI. bought the right of the house of Penthièvre, the next male heirs in reversion, to Brittany. 1494—Paleologus, the nephew of Constantine, the last Christian Emperor, sold his right to the whole empire of Constantinople to Charles VIII. of France for the disposition of the Morea when conquered, an estate of five thousand pounds in lands in France or Italy, and an annual pension of 4300 ducats. Jane, Queen of Naples, sold sovereignty of Avignon to Clement VI. for 80,000 florins; 1 Halleck, *Int. L.*, 4 ed. (1908) 165-166. 1768—France acquired Corsica from Genoa for two million francs. 1777—Portugal ceded islands of Annabon and Ferdinand del Po to Spain; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 379. 1867—Russia sold Alaska to United States for \$7,200,000. 1885, June 2nd—Spain sold the Caroline, Pelew, and Ladrone Islands to Germany. 1889—Spain sold Carolina Islands to Germany for 25,000,000 pestos. 1898—Spain ceded Porto Rico to United States of America. 1917—Denmark sold Danish West Indies to United States of America for

\$25,000,000 and all its rights in Greenland. For other cases of transfer by sale, see Wilson & Tucker, *Int. L.*, (1901) 100, 101. Louisiana, cession of: 1762, Nov. 2—Treaty of Fountainebleau, France ceded Louisiana to Spain followed by royal order in the usual form for the delivery of the territory to Spain, which was accepted in 1769. 1800, Oct. 1—Secret treaty of St. Ildefonso between Spain and France, Spain engaged to cede Louisiana as possessed by Spain to France upon certain terms. Upon objections being raised by Great Britain and United States of America, France ceded the territory to the United States in 1803, the treaty of 1800 having never been executed; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 380-382. 1803, April 30—Treaty of Paris. France ceded to United States, followed by act of delivery by France to United States of Dec. 20, 1803. For reference to the formulas used in these orders of delivery, see Davis v. Police Jury of Concordia, 9 Howard, 280 at 291 (1850); United States v. Reynolds, 9 Howard, 127 at 149 (1850); 1 Moore, *Dig. of Int. L.*, (1906) 433 et seq. "History of the Louisiana Purchase," (1902) James T. Howard. Florida "was first discovered, inhabited and governed by France as part of Louisiana, and by that power ceded to Great Britain. By the treaty of peace of 1763, the boundary between France and Great Britain was declared to be through the Iberville, Lakes Maurepas and Pontchartrain, to the sea; and the French king ceded the river and port of Mobile, and everything he possessed on the left side of the River Mississippi, with the exception of the town of New Orleans, and the island on which it is situated. Deer and Ship Islands were

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therefore included in this cession to Great Britain. The King of Spain, by another article of the same treaty, ceded to Great Britain Florida, with the fort of St. Augustine, and the Bay of Pensacola, as well as all that Spain possessed on the continent of North America to the east or southeast of the River Mississippi. In 1763, the King of Great Britain by proclamation created the governments of East and West Florida. The Government of West Florida was bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast, from Appalachicola to Lake Pontchartrain; to the westward by the Mississippi, Lakes Pontchartrain and Maurepas; to the north by the thirty-first degree of north latitude; and to the east by the River Appalachicola. In 1764, the northern line of Florida was extended by Great Britain from the Appalachicola, at the thirty-first degree, to the mouth of the Yazoo, on the Mississippi River." Catron, J., in *United States v. Powers Heirs*, 11 How. 570 at 578 (1850), see 1 Moore, *Dig. of Int. L.*, (1906) 439. 1779, May 8—Spain declared war against Great Britain. 1781—Spain attacked the Floridas, and the British forces capitulated. 1783, Jan. 20—Preliminary treaty of peace signed at Paris, which provided in the third article: "His Britannic Majesty will cede to His Catholic Majesty East Florida, and His Catholic Majesty will retain West Florida." 1819, Feb. 23—Treaty between United States of America and Spain, by which Spain conveyed to the United States not only all the Floridas but also all the Spanish titles North of the 42nd parallel of North latitude from the source of the Arkansas River to the Pacific Ocean; the United States in return assuming the obligation of satisfying certain claims of its citizens against Spain, and engaging to cause satisfaction to be made for damages

suffered by the Spanish inhabitants of the Floridas at the hands of the American forces, with certain other provisions. 1821, July 10—The formal act of cession of the transfer of East Florida to the United States was signed by the Spanish Governor on the part of Spain and the United States Commissioner; 1 Moore, *Dig. of Int. L.*, (1906) 439 et seq. 1842, Aug. 29—Treaty of Nankin, China, ceded Island of Hong Kong to Great Britain; 5 Moore, *Dig. of Int. L.*, (1906) 416. 1850—Denmark sold all possessions of the Danish Crown on the Gold Coast or coast of Guinea in Africa to Great Britain for ten thousand pounds; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 379. 1859—Austria ceded Lombardy to France. France ceded it to Sardinia without having taken possession. Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a gift, and some weeks afterwards France on her part ceded Venetia to Italy; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 382. For Convention between United States of America and Denmark providing for cession of the Virgin or West Indies Islands, see 12 American J. *Int. L.*, Supp. 350. Exchange: 1784—France ceded islands of St. Bartholomew in West Indies to Sweden in exchange for free use of the harbor of Gottenberg and certain other commercial advantages; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 379. 1875, April 25—By treaty, Japan exchanged with Russia that part of the Island of Sakhalin occupied by it for the Kurilies. 1878—Roumania ceded to Russia a portion of Bersardia in exchange for the Dobroutcha. 1900—Great Britain ceded Heligoland to Germany in exchange for territory in East Africa. 1911—France and Germany by treaty exchanged territory in Africa. Partition: 1700—Treaty of partition of Spanish dominions; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 376. 1899, Nov.

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Voluntary Transfer

8—Germany entered into a treaty of partition with Great Britain in regard to the Samoan Islands. Compulsory partition of Poland, so-called, not strictly a partition, since partition is a severance of a title held in common. Mortgage and pledge: Robert, Duke of Normandy, in order to raise money for the First Crusade, mortgaged his duchy for 666 pounds weight of silver to his brother William, and transferred possession before departing for the Holy Land; 1 Halleck, *Int. L.*, 4 ed. (1908) 166. 1469—Denmark mortgaged Orkney and Shetland to Scotland, the possession of which has been retained by Scotland long enough (according to Hall) for a title by prescription to be set up; Hall, *Int. Law*, 6 ed. (1909) 339. 1585—United Provinces concluded an agreement with Queen Elizabeth by which she promised to send 5,000 foot and 1,000 horse, under an English general at her own expense, and to be reimbursed when the war was over; the provinces, as security for this, put several Dutch towns into her hands temporarily; Grotius, by Vreeland, (1917), 17; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 388. 1654—Denmark hypothecated the Provinces of Holland to Sweden as security for peace then concluded; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 388. 1768—Genoa pledged the Island of Corsica to France; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 288; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 388. House of Savoy hypothecated the Pays de Vaud to the cantons of Bern and Freiburg, and when the debt was not paid they forcibly seized and retained the territory; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 83. 1803—Sweden pledged the town of Weimar to the Grand Duchy of Mecklenburg-Schwerin to secure 1,258,000 thalers with interest at 3%. Sweden, in 1903, formally waived her right to redeem; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 233n; 1

Phillimore, *Int. L.*, 3 ed. (1879-1888) 388. Lease: 1894—Great Britain leased so-called Lado Enclave to Congo Free State, which was rescinded by treaty of London of May 9, 1906, Art. 1; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 234. 1898, March 6—China to Germany, District of Kiaochau. See 4 American J. *Int. L.*, Supp. 285; 5 Moore, *Dig. of Int. L.*, (1906) 473; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 233; 1 Westlake, *Int. L.*, 2 ed. (1910) 135. 1898, March 27—China to Russia, Port Arthur and Ta-Lien-Wan (Dabney); 1 Oppenheim, *Int. L.*, 2 ed. (1912) 232, 288; 1 Westlake, *Int. L.*, 2 ed. (1910) 135. For translation of the text of the lease of Port Arthur and Ta-Lien-Wan, see Vladimir, "Russia on the Pacific and the Siberian Railway," (1899) 360. See 4 American J. *Int. L.*, Supp. 289. See 5 Moore, *Dig. of Int. L.*, (1906) 474. 1905—By treaty of Portsmouth, Russia transferred to Japan. For text of article 5, see Hall, *Int. Law*, 6 ed. (1909) 289n¹. 1898—China to France, Kuang-chow for 99 years. See 4 American J. *Int. L.*, Supp. 293; 5 Moore, *Dig. of Int. L.*, (1906) 475; 1 Westlake, *Int. L.*, 2 ed. (1910) 135. 1898—China to Great Britain, Wei-Hai-Wei and land opposite to Hong Kong. See 4 American J. *Int. L.*, Supp. 297; 5 Moore, *Dig. of Int. L.*, (1906) 475; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 233, 288; 1 Westlake, *Int. L.*, 2 ed. (1910) 135. 1903—Cuba leased a coal-mining station to United States of America. For text, see Wilson, *Int. L.*, (1910) 153n¹⁷. 1903—Republic of Panama transferred a 10-mile strip to the United States. See Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 135. One of the cases which he cites, however, of a lease by the Sultan of Zanzibar to the British East African Company, does not seem to be in point, as the lessee was a corporation and not an independent or indeed any state.

CONSENT OF THE INHABITANTS TO THE TRANSFER.

§243. Territory was transferred by the monarchs of Europe voluntarily or by conquest without regard to the wishes or convenience of the inhabitants of the territory in question, who were regarded as so many chattels to be handed around as suited the convenience of their royal masters. However, the growth of democracies and the increased potency of the voice of the people in state affairs have formed a basis for the idea that the inhabitants of the territory should be consulted before their territory is transferred from one state to the other; that it is contrary to humanity and the individual interests of man to forcibly tear a community from the political power of one state and hand it over to another without giving the inhabitants any say in the matter.¹⁴ There is great force in this view, but there is a difference of opinion among the writers, and it would hardly do to venture a statement that this is a compulsory factor in international conveyancing, as the practice among the states has not been uniform.¹⁵ Or, stating the case in another way, the inherent power of every community to form or choose its own government should not be interfered with by any other community on any ground whatever, but it is in fact so interfered with frequently in international life.

¹⁴ Grotius, *Belli, ac. Pacis* (1625), Whewell's Trans. II. VI. V. VI.; Hershey, *Int. L.*, (1912) 183; 1 Moore, *Dig. of Int. L.*, (1906) 274 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 63. Vattel, (1758) *Chitty's Trans. Book I. §264*, says that the inhabitants are not bound by the cession if they are capable of resistance. He instances the case where Francis I., having by treaty of Madrid engaged to cede Burgundy to Charles V., the states of that province declared that they would take up arms and endeavor to set themselves at liberty rather than pass into a new state of subjugation.

¹⁵ Hall, *Int. Law*, 6 ed. (1909) 46, 47. No consent of people on Hawaiian Islands to transfer to the United States; 1 Moore, *Dig. of Int. L.*, (1906) 274. 1866—Treaty of Prague, Austria transferred to Prussia all rights to

Schleswig-Holstein acquired by the Peace of Vienna of 1864, "with the reservation that the inhabitants in Northern Schleswig shall be united anew to Denmark if they express the desire for it in a free vote;" Woolsey, *Int. L.*, 6 ed. (1897) 63. 1860—Sicily, the Marches and Umbria were annexed to the kingdom of Italy by direct and universal suffrage; Woolsey, *Int. L.*, 6 ed. (1897) 63. 1860, March 4—Treaty of Turin, uniting Savoy and Nice to France, in the first article provided that "this union shall be effectuated without constraining the will of the inhabitants, and that the governments of the Emperor of the French and the King of Sardinia will agree as soon as possible as to the best means of estimating and certifying the demonstrations of this will;" Woolsey, *Int. L.*, 6 ed. (1897) 64.

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Parties to the Transfer

Parties to the Transfer.**PRELIMINARY.**

§244. It is now necessary to give some attention to the bodies who may participate in a transfer of state territory. In these cases there is no question of capacity, as each independent state is, as we have already pointed out, fully capable of performing all acts of international life. There is no such question as idiocy, or infancy, which occur in the municipal law.¹⁶ Since, therefore, the capacity of acting in international life is confined to independent states, it follows that questions will arise as to whether a party is in fact an independent state, and whether it belongs to the class of parties who are considered capable of performing international functions. This question will arise as to *de facto* or insurgent governments, tribes outside the membership of the family of nations, and dependent states, which we may consider in the order named.¹⁷

MONARCHIES.

§245. In former days of absolute monarchies, territory was the personal property of the king, and as such he could dispose of it by will, conveyance, gift, marriage settlement, just as an individual to-day may dispose of the private property he holds under the municipal law.¹⁸ There was no question in any of these cases as to the capacity of the parties. Monarchs were of such superior and exalted order that they were always considered capable of performing the kingly functions even though in fact driving idiots or hopeless maniacs. A number of cases of these dispositions of property have been referred to in the note.¹⁹ With the advent of democracy they are obsolete, as the people are asserting the principle that state property belongs to them and does not lie in the gift of any one man.

¹⁶ See §344, post, on capacity of parties to a treaty.

¹⁷ Monarchies..... §245

Limited governments..... §246

Belligerent states..... §247

Barbarous tribes..... §248

Neutralized states..... §249

De facto governments..... §250

Neutral and belligerent..... §251

Dependent states..... §252

¹⁸ When absolutism prevailed, territory was frequently transferred by

marriage settlement, testamentary disposition and inheritance. These cases are gradually disappearing and the only one probably left remaining is inheritance. See Vattel, (1758) Chitty's Trans. Book I. §261.

¹⁹ Emperor Louis V. created the Dauphin Humbert King with full power of disposing by will. 1343—Humbert ceded his dominions to Philip of Valois by deed of gift. Emperor Henry VI. conferred upon Richard I,

the Kingdom of Arles. Emperor Baldwin gave the Kingdom of Thessalonica to the Duke of Burgundy. Charles II., King of Sicily and Count of Provence, changed by will the order of succession of the county. 1380—Jane, Queen of Naples, adopted Louis of Anjou by solemn and public deed, upon which the claim of Charles VIII. to the throne of Naples, was founded. 1544—English Parliament changed succession to the crown and omitted to make any provision for the failure of issue of the children of Henry VIII., who by his will, and by virtue of the Statutes 28, Henry VIII., Chap. 7, and 35 Henry VIII., Chap. 1, named the descendants of his sister Mary, Duchess of Suffolk, as his heirs in case of such failure; 1 Halleck, *Int. L.*, 4 ed. (1908) 167. Will of King Leopold of Belgium bequeathed the Congo Free State to Belgium. "The exchange of territories, and especially of portions of territories, is familiar to all who are acquainted with European History, and with the provisions of the principal treaties. "The islands of Sardinia and Sicily, the Duchies of Tuscany, Parma, and Placentia, were continually exchanged with each other in the multiplicity of entangled negotiations which intervened between the Peace of Utrecht, in 1713, and the Treaty of Aix-la-Chapelle, in 1748. By the 6th Article of the Quadruple Alliance in 1720, Philip V. of Spain renounced the reversionary title on Sicily, conferred on him by the Treaty of Utrecht, and received in exchange a reversionary title to Sardinia; and by the first Article, the Duke of Savoy made a reciprocal renunciation of his rights to Sicily. By the same Treaty, it was agreed that the reversion of Tuscany, Parma, and Placentia, about to be vacant by the extinction of the male descendants of the Houses of Medici and Farnese, should be declared male fiefs of the

Empire, and the investiture be conferred by the Emperor on the oldest son of the second wife (Elizabeth Farnese) of Philip V. By the Treaty of Vienna, in 1738, Tuscany was given, in reversionary exchange for the Duchy of Lorraine, to the Duke of that province; Naples and Sicily to Don Carlos, the son of Philip V.; while Parma and Placentia were ceded to the Emperor;" 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 377, 378. Instances of Dowry: In the following instances the wives mentioned brought to their husbands the dowries specified: Catharine of Braganza, wife of Charles II. of England, Tangiers and Bombay. Isabella of Arragon, wife of Philip III. of France, Carcassonne and Béziers. The daughter of Alfonso X. of Castile, wife of Alfonso III. of Portugal, Algarve. Joanna, Queen of Navarre, wife of Philip IV. of France, Navarre. 1425, Blanche of Navarre, wife of John II. of Arragon, Navarre. Ann of Brittany, wife of Charles VIII., and Louis XIII. of France, Brittany. Mary of Burgundy, wife of Emperor Maximilian, Low Countries, including Franche-Comté, Flanders and Artois. A son of this couple, "Philip the Handsome," married Jean of Castile, sole heiress of the crowns of Arragon and Castile; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 383, 384. Cases of descent frequently occur: James VI. of Scotland succeeded to the throne of England partly by descent and partly by nomination of Elizabeth. This is the case of a succession of a king to a throne, which is to be distinguished from the case of transfer of territory. The crown itself came to be an institution to which the king succeeded. See will of Charles II. of Spain dated October 2, 1700, by which he bequeathed his dominions to the second son of the Dauphin of France; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 387. Gifts: 1004—Pope John XVIII. offered the Island of

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Parties to the Transfer

TRANSFER BY LIMITED GOVERNMENTS.

§246. When the government is a limited monarchy or a democracy, the government in which the interest in the territory resides is generally subject to some limitation in the matter of disposition of the whole or any part of the state territory. The limitation is not a limitation on the government unless the consent of the people is required. The necessity of the consent of the legislature is a check on the executive, not a restraint on the government.

BELLIGERENT STATES.

§247. Cases of transfer of state territory by a belligerent state have rarely occurred. If the belligerent state does not succeed in the revolution, the transfer would be invalid as against the parent state because the insurgent state could hardly assume to transfer any territory except that which was formerly a part of the parent state, and which it was trying to wrest from it. If the case should occur of a belligerent state, during the belligerency, receiving territory from another state, and then disposing of that territory to a third state, there seems to be no reason why the crushing out of the revolution would affect the title of such third party. If the belligerent state becomes successful, then the conveyance it has made during the belligerency will stand just as a conveyance by any other independent state. The parent state obviously cannot transfer any territory of the revolted portion if the revolutionists are successful.²⁰

BARBAROUS TRIBES.

§248. The case of an uncivilized or barbarous tribe has already been frequently referred to,¹ and it has been pointed out that the

Sardinia to whomsoever would take it from the Saracens. 1297—Boniface VIII. gave Sardinia and Corsica to James II. of Arragon. 1485—Queen Charlotte of Cyprus gave that island to Duke Charles I. of Savoy. 1530—Emperor Charles V. gave Malta to the Knights of St. John; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 380. 1790—Leopold II. on accession to the Austrian crown, renounced his sovereignty over Tuscany in favor of his second son Ferdinand II. For instances in ancient

times, see Zouche, *L. of Nations* (1650), Carnegie ed., Part I. §III. 1, II. §III. 9. As to various successions to thrones see Zouche, *L. of Nations* (1650), Carnegie ed., Part II. III. 10 et seq.

²⁰ Grant of territory by British Government after declaration of independence is invalid. *Harcourt v. Gaillard*, 12 Wheat. 523 (1827); *Snow Cases*, (1893) 15; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 815, 816.

¹ See §238, ante.

Increase, Decrease, by Act of State

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states of Western Europe were under the impression or acted on the notion that such tribes could be dispossessed by force at the option of the more powerful civilized states. The land was generally taken from these tribes by involuntary transfer, and cases have been very rare where the occupying powers have attempted to deal fairly with them and make a purchase. The modern method is to establish a protectorate over the weaker state and thus gradually swallow it up.² It has been intimated, however, that treaties of cession by uncivilized chiefs or tribes have no validity, as such tribes lack the necessary capacity to convey.³ Such cessions have in fact been made and acted upon. All transfers in international law are judged as to their validity solely by remaining as accomplished facts.

NEUTRALIZED STATES.

§249. No case appears to have arisen of a transfer by a neutralized state. The interesting question will arise whether the territory transferred would carry with it the quality of neutrality which appertained to it while in the ownership of the neutralized state. Thus, suppose, for instance, Switzerland should dispose of one of its cantons to France or to Germany, these two latter states not being neutralized. What effect would the transfer have upon the neutrality of the territory conveyed? Such case is of rare occurrence as the states which have been neutralized are small, compact in territory, and the interest of all parties is best conserved by keeping that territory intact and avoiding the raising of any such question as would occur by reason of a transfer of the territory.⁴

DE FACTO GOVERNMENTS.

§250. A de facto government may dispose of state territory, and upon reassertion of the power of the real government or the legal government, the question will arise of how far the disposition is good and whether the government coming in can invalidate the conveyance and take the territory back. No case appears to have arisen.

² The Anglo-Russian convention as to the partition of Persia is simply the beginning of an annexation of the territory of that state, a process by which the state of Persia will probably be absorbed and removed from international existence just as Poland was disposed of. See Hershey, *Int. L.*, (1912) 185.

³ See §345, post.

⁴ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 286, says may not cede, but neutralized parts of not neutralized states may be ceded. 1860—Neutralized part of Savoy transferred to France by Sardinia.

§§251, 252, 253

Effect of the Transfer

NEUTRAL AND BELLIGERENT STATES.

§251. There is no restraint whatever on a transfer of territory from a neutral to a belligerent, or vice versa. The only question is, how far such a transfer involves a departure from neutrality which is discussed in a subsequent part of the treatise.⁶

DEPENDENT STATES.

§252. A dependent state is limited as to its international function to a greater or less extent by the nature of the relation existing between it and the state on which it is dependent.⁶ It is simply a question of municipal law whether the dependent state may transfer any or all of its territory to another state.⁷ The question will also arise in such a case of whether the independent state may without violation of the terms of the union between them dispose of any or all of the territory of the dependent state without its consent.⁸

Effect of Transfer of State Territory.

PRELIMINARY.

§253. Several important questions arise over the effect of the transfer: (A) as between the parties, (B) as to third states, (C) as to the inhabitants or municipal law of the territory ceded. There is a distinction to be drawn as to the effect pending the transfer, that is, between the date of the treaty and the actual delivery of possession.

⁶ See §682 et seq., post.

⁶ See §52, ante, on relation between independent and dependent states.

⁷ Oppenheim, Int. L., 2 ed. (1912) Vol. 1, 286, says dependent states may not cede without consent of independent state. It is more accurate to say is a matter of municipal law, as an independent state may have that international function, not by consent of the independent state but by the terms of the original union between them.

⁸ The member states of the United States of America are indirectly prohibited from disposing of any of their territory by that clause in the Federal Constitution of 1787 forbidding them

from entering into any treaty or compact with a foreign power. See §348, post, as to treaties. They can, however, convey territory among themselves with the consent of Congress, and such transfers are frequently made. As to power of the Federal Government of the United States of America to dispose of territory of a member state without its consent, see 1 Moore, Dig. of Int. L., (1906) 171; Woolsey, Int. L., 6 ed. (1897) 160, 161. 1863—Ionian Islands could not have merged in Greece without the consent of Great Britain, see 1 Oppenheim, Int. L., 2 ed. (1912) 286.

There is no distinction between voluntary and involuntary transfer in this connection,⁹ although an obscure suggestion to that effect has been made.¹⁰ In each case, the jurisdiction of one state displaces that of the old state, and the surrounding circumstances of the transfer can have no effect on the power of the new owner, which is restrained, if at all, by the international factors of conduct. The practice in ancient and medieval times, was to treat the inhabitants of territory acquired by force in war with considerable severity, and the attention of the older writers was accordingly directed to the principles of justice which they conceived should animate the conqueror, in which they merely expressed the growth in humanity and regard for the worth of the individual and value of private property.¹¹ Since the jurisdiction over the territory is transferred to another state, or rather the jurisdiction of the former state is displaced by the jurisdiction of the new owner, it follows that the transferee state, by virtue of its absolute power, subject to no external political superior, may make such changes as it sees fit in the municipal law, subject only to such international obligations as may exist independently of the transfer, and to such stipulations as may be inserted in the treaty of cession. These stipulations will have such binding force as pertains to treaties in general.¹²

MUNICIPAL EFFECT OF TRANSFER—LAW OF THE CEDED TERRITORY—INHABITANTS.

§254. Stipulations in a treaty of cession concerning the municipal law which is to be applied in the ceded territory are extremely rare. The international factors of conduct alone control the situation. The local institutions and municipal law will be altered in such manner as the state to which the transfer is made may determine, as the territory is henceforth under its exclusive jurisdiction. It cannot, however, in fact make such alterations until it has acquired actual

⁹ Hall, *Int. Law*, 6 ed. (1909) 566semble.

¹⁰ Hershey, *Int. L.*, (1912) 182.

¹¹ Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* III. XV.; 2 Halleck, *Int. L.*, 4 ed. (1908) 516, 517; Vattel, (1758) Chitty's *Trans.* Book III. §§200, 203.

¹² Some writers attempt to lay down

rules as applicable to the transaction, e. g.—Hall, *Int. Law*, 6 ed. (1909) 565; 2 Halleck, *Int. L.*, 4 ed. (1908) 525 et seq. Hershey, *Int. L.*, (1912) 182, correctly apprehends that a treaty of cession usually contains stipulations as to effect of the transfer and that no general rules can be laid down.

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possession of the territory and is able to exercise its jurisdiction in fact. Therefore, the fact of the jurisdiction of the ceding state remains until displaced by the fact of the jurisdiction of the state to which the cession is made, and consequently the old municipal law and institutions remain except so far as altered by the ceding state until possession is delivered.¹³

The effect on the inhabitants of the territory ceded is to be considered. The principal question which arises is as to the change in allegiance. The inhabitants are now members of a new state, and this may present a case of considerable personal difficulty to many individuals. The former rule was to pay no attention whatever to their wishes in the matter. Beginning, however, with the middle of the 17th century, the practice grew up of inserting in treaties of cession clauses giving the inhabitants the choice of remaining and becoming members of the government to which the territory was ceded or of retaining their old membership.¹⁴ Here a question will arise as to the effect on members of the state outside the territory at the time of cession, and who obviously could not be in fact pro-

¹³ Martens, G., *Law of Nations*, (1788) Cobbett's Trans. III. III. 32n, says that sometimes in a treaty of peace or of exchange is provided what shall be the regulations concerning the religion in the ceded provinces, as was done in the treaty of Abo between Russia and Sweden, Art. 8; between Austria and Prussia, 1742, Art. 6; between Poland and Prussia, 1773, Art. 8; in the treaty of exchange between Sardinia and Geneva, 1754, Art. 12, etc.

¹⁴ The capitulation of Arras in 1640 was said to be the first case where an option was given to inhabitants, since which the practice is to insert such a clause in all treaties of cession; 1 Westlake, *Int. L.*, 2 ed. (1910) 70, 71. Thus Article 2 of the Peace Treaty of Frankfurt, 1871, which ended the Franco-German War, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege

of transferring their domicile from the ceded territory to French soil, but they were allowed to keep their landed property within the ceded territory; Hall, *Int. Law*, 6 ed. (1909) 567n²; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 290, 291; 1 Westlake, *Int. L.*, 2 ed. (1910) 73. 1866—Treaty of Prague, ceding Schleswig-Holstein from Austria to Prussia, provided "with the reservation that the inhabitants in northern Schleswig shall be united anew to Denmark, if they express the desire for it in a free vote;" Woolsey, *Int. L.*, 6 ed. (1897) 63. By Louisiana Treaty, United States stipulated that inhabitants of the ceded territory should be protected in the free enjoyment of their property. See *Soulard v. United States*, 4 Pet. 511 (1830). For list of treaties containing clause securing liberty to inhabitants of a ceded territory to keep their nationality of origin, see Hall, *Int. Law*, 6 ed. (1909) 567, n.²; 1 Westlake, *Int. L.*, 2 ed. (1910) 71, n.², 72, 73.

vided for by any action taken at the time because they were not within the jurisdiction.¹

The question as to inhabitants is of diminishing importance because aliens now generally have the same property rights as members of the state, and the latter are only distinguished by the right to vote and a few other immaterial matters which are not of great practical importance. There is, furthermore, full freedom of international movement which enables any member of the territory transferred to freely leave if he does not like the new state. In the middle ages there was no such freedom, and what freedom existed was of little advantage owing to the practical difficulties and expense of travel. Consequently, when a transfer was made in those times, the inhabitants had no recourse but to accept the new government.² They were in fact imprisoned in the jurisdiction of the state and forced to be transferred with the transfer of that jurisdiction.³

EFFECT PENDING COMPLETION OF THE TRANSFER.

§255. It seems clear that on transfer of territory the jurisdiction of the ceding state is replaced by that of the state to which the cession is made. Unless otherwise provided, the change in jurisdiction is regarded as taking place on the date of the signing of the treaty of cession on the principle generally accepted, that treaties take effect

¹ There are two classes of inhabitants to be considered,—those in the territory at the time of transfer; those who are outside at the time of transfer. There are two ways of treating them: (a) The subjects of the ceded state domiciled in the ceded territory, whether within the jurisdiction or without at the time of change, are not *prima facie* included and must opt. (b) Persons born in the ceded state, whether within or without, to be *prima facie* members of the new state. Different treaties have adopted different provisions. For some of them, see 1 Westlake, Int. L., 2 ed. (1910) 72, 73.

² See §434, post, on international change of membership.

³ There is a distinction between the case of the complete merger of the state and the case where there is a

transfer merely of part of the territory. In the former, the old state disappears and there is no question whatever of inhabitants retaining their allegiance, because there is no state to which they can adhere; Lawrence, Int. Law, 5 ed. (1913) 94. "The Civil and Political Status of Inhabitants of Ceded Territories," Alexander Porter Morse, 14 Harv. Law Rev. 262, et seq. See U. S. v. Percheman, 7 Peters, 51 (1833); Snow Cases (1893) 21. "Are Franchises Affected by a Change of Sovereignty," Paul Fuller. 3 Col. Law Rev. 241, et seq. "Purchasable Offices in Ceded Territory," Percy Bordwell; 3 Amer. J. Int. Law, 119 et seq. See 2 Halleck, Int. L., 4 ed. (1908) 506; 1 Oppenheim, Int. L., 2 ed. (1912) 289, 291; 1 Phillimore, Int. L., 3 ed. (1879-1888) 449.

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as of the date of signing unless otherwise provided.^{**} Few cases have arisen on this point. Where there is a conquest, the transfer of the jurisdiction occurs in fact on the forcible occupation, and the treaty of peace, if there is one, merely ratifies or confirms the accomplished fact. The old state could not in fact perform any act of jurisdiction in the territory after the occupation. These principles are so clear that they are generally accepted in international relations and no question has been raised as to their application. The only difficulty which has arisen is as to the case of a voluntary transfer in considering the status of the ceded state between the date of the treaty of peace and the actual delivery of possession.⁴

INTERNATIONAL EFFECT OF THE TRANSFER.

§256. Third states may be concerned in the transfer where there are treaty obligations between the ceding states and other states, which treaty obligations are in any way affected by the transfer of the territory in question. Most treaties which exist between independent states, as, for instance, treaties of extradition, peace, and amity, etc., will not be affected in any way by any increase or diminution in the territory of the states which are parties to the treaties. The cases where a treaty in some way relates to a particular territory are somewhat rare, although they do occur. When a case of this kind arises, the third state, which is a party to the treaty, will obviously be concerned over whether the state to which the territory is ceded will assume the obligations under the treaty or whether the transfer of the territory will result in a damage to its interest under the treaty. In such a case the third state may, if the arrangements made as to the treaty in the transfer are not to its liking, bring to bear such factors influencing international conduct as it may desire

^{**} See §400, post, on time of treaty going into effect.

⁴ The principal precedents as to the status of the ceded state between the date of the treaty of cession and the actual delivery of possession, arose over the acquisition of Louisiana and Florida by the United States of America, and the question was presented in considering the validity of grants of land made by the Spanish and French envoys after the date of the respective treaties of cession and before the actual delivery

of possession. The United States Supreme Court held that all grants made after the date of the treaty of cession were void and conferred no title on the grantees. Congress passed a number of statutes validating certain titles acquired before the date of the treaties of cession, and a number of cases arose in the Supreme Court of the United States over these titles under the Acts of Congress. See Crandall, *Treaties*, 2 ed. (1916) 569, 623.

in order to produce a favorable course of action on the part of the contracting parties.⁵ The possibility that such action will be taken generally produces in states making the transfer a lively desire to provide in the cession for treaty obligations, particularly when the third state is a great power able to bring overwhelming pressure to bear upon other states. We find, therefore, that usually in practice any existing treaty obligations are taken care of by the terms of the transfer.⁶

THIRD STATES AND TRANSFER.

§257. It is obvious, since the states of the world are independent, that when any two of these independent states agree together to make a transfer of territory, no other state, being an equal, has any legal ground to interfere. It may or may not have the power to interfere, which depends on whether it is in fact stronger than the other two

⁵ See §105, ante, on international factors of conduct.

⁶ 1648—Treaty of Münster, when Upper and Lower Alsace and other places comprising two-thirds of a province, liable to a certain debt, were ceded to France, it was stipulated that France should pay two-thirds of the debt; 1 Wildman, *Int. L.*, (1849) 68. 1859—On cession of Lombardy to Italy, Italy assumed liability for the local debts of the ceded provinces; 1 Westlake, *Int. L.*, 2 ed. (1910) 79, 80. 1866—Denmark ceded Schleswig-Holstein to Prussia. Latter agreed to assume proportionate part of debt. 1866—Italy assumed a proportion of the Papal debt based on the revenue of the territory which she had appropriated. 1871—France ceded Alsace-Lorraine to Germany, and latter refused to assume a part of the French national debt. 1878—Russia did not assume any part of the general Turkish debt with respect to territory then acquired by her. 1742—Frederick the Great assumed payment of the Silesian loan when he acquired Silesia by conquest from Maria Theresa of Austria. 1893—Peru was forced to cede territory to Chile and there was an apportionment

of the debt. 1839—Belgium took over part of the Netherlands debt; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 18. 1878—Servia, Montenegro and Bulgaria were saddled with part of the Turkish debt. 1898—United States expressly prohibited Cuba from assuming liability for any debts incurred under Spanish rule. In the case of Texas, United States refused to assume liability for payment of Texas debt. Arbitration commission decided in favor of the United States; Moore *Int. Arb.* (1898) 4, 3594; 1 Westlake, *Int. L.*, 2 ed. (1910) 78; Snow Cases, (1898) 18. United States refused to assume payment of the Cuban debt; 1 Westlake, *Int. L.*, 2 ed. (1910) 79, n.¹ As to Philippine debt, see 1 Westlake, *Int. L.*, 2 ed. (1910) 85. 1902—The arrangements made by Great Britain on annexation of South African Republic and Orange Free State, after conquest of the same, are referred to by 1 Westlake, *Int. L.*, 2 ed. (1910) 80. See 1 Moore, *Dig. of Int. L.*, (1906) 339; 1 Westlake, *Int. L.*, 2 ed. (1910) 76; Wilson, *Int. L.*, (1910) 51n. See §457, post, on effect of change of government on obligations of a state.

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Prescription

states. Many cases of such interference have occurred, and they have been based upon jealousy of other states, upon the desire of maintaining the balance of power.⁷ and on various other reasons which it is unnecessary to enumerate. All cases of such interference may be relegated to the sphere of politics, which lie entirely outside the purview of the international lawyer. A few of these cases have been referred to in the note by way of illustrating the actual conduct which has taken place in this particular.⁸

PRESCRIPTION.

§258. Prescription in the sense in which it is used in the municipal law seems to be entirely inapplicable in international affairs. Its operation necessarily implies a political power furnishing a means of redress, and, by the prescription denying redress, thereby in effect extinguishing the claim. Since there is no such political power superior to the independent states of the world, there is no authority which can prevent any such state from asserting a claim to territory or occupying territory at any time which it sees fit. Whenever its self-interest impels it to defy the factors influencing state conduct operating to the contrary, it may proceed with any seizure it deems advantageous. No taking of territory, therefore, which continues as a fact can be unlawful according to international law, however repugnant to the principles of the municipal law or ideas of morality and ethics. There is a division of opinion among the writers on the subject, and none of the arguments which they have advanced seem to go to the real point involved.⁹ Lapse of time and long continuing

⁷ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 289.

⁸ 1867—King of Holland proposed to sell Luxemburg to France, the North German Confederation objected, and the cession was not effected; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 289. 1895—Treaty of Shimonoseki between China and Japan provided for the cession to Japan of the Liao-toang Peninsula, including Port Arthur. Russia, Germany and France objected, and, under compulsion, the lease was not carried out, the grounds being the danger to the independence of Korea and the humiliation of the Court of Peking if Japan thus acquired a footing upon

the Gulf of Pe-chi-li. Great Britain did not join in the remonstrance; Hall, *Int. Law*, 6 ed. (1909) 289. For text of the note, see Wilson, *Int. L.*, (1910) 63, n.¹².

⁹ 1 Cobbett Cases, 3 ed. (1909) 108; Grotius, *Belli. ac. Pacis* (1625), Whewell's Trans. II. V.; Hall, *Int. Law*, 6 ed. (1909) 119-120; Hershey, *Int. L.*, (1912) 179; Lawrence, *Int. Law*, 5 ed. (1913) 166; 1 Moore, *Dig. of Int. L.*, (1906) 293 et seq.; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. II. III.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 308-311; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 360 et seq.; Vattel, (1758) Chitty's Trans. Book II. §141 et seq.;

existence of any state of affairs have a powerful effect on the human mind, and deaden opposition and inquiry. This is true in international affairs as well as municipal, and is the foundation of the notion that a state may acquire title by prescription. Long continued possession of territory which has been forcibly acquired diminishes the ardor of the former owner to regain possession, and to that extent strengthens the title of the new owner.

STATE SERVITUDES.

§259. One independent state may confer on another independent state the privilege of doing certain acts within its jurisdiction or may agree to do or abstain from doing certain acts to which it is competent as an independent state. Instances of such agreements are quite common and they present no legal difficulties, being based entirely on an agreement between the parties concerned. Such a state of facts corresponds to what is known as a servitude in the Roman law,¹⁰ or an easement in the English common law, and, accordingly, many writers have attempted to transfer the conceptions of the municipal law to international law, and a few of the definitions are collected in the note.¹¹ There is, however, some difference of opinion and the conception has been rejected as inapplicable to international transactions, and it is believed that the latter view is correct. The municipal law on this point is complicated and extensive, involving questions of prescription, construction and implied grant, all of which are totally inapplicable in international life, where there is no political superior, and the cases which occur arise entirely out of express agreement. The attempt, therefore, by

1 Westlake, *Int. L.*, 2 ed. (1910) 94; Wheaton, *Elements*, Dana's ed. (1866) 239; Woolsey, *Int. L.*, 6 ed. (1897) 65; Wilson, *Int. L.*, (1910) 82; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. III. 8. "Prescription," Jackson H. Ralston; 4 *Amer. J. Int. Law*, 133 et seq.

¹⁰ For sketch of Roman Law of Servitude, see 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 391.

¹¹ "International servitudes are perpetual restrictions not involving a loss of sovereignty, on the territorial or personal sovereignty, of one State in

favor of another State or of other States;" Hershey, *Int. L.*, (1912) 176. "State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State by which a part or the whole of its territory is, in a limited way, made perpetually to serve a certain purpose or interest of another State;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 273, 274. "Servitudes in international law constitute a restriction upon the exercise of the territorial jurisdiction of a State in favor of one or more States;" Wilson & Tucker, *Int. L.*, (1901) 146.

many of the writers to classify the supposed servitudes¹² and lay down some principles seems doomed to failure and to be without practical result.¹³ We have collected in the note a few of the instances commonly referred to as servitudes by the writers.¹⁴ The

¹² As positive, negative, in rem, in personam, active, affirmative, military, economic, etc. See 1 Cobbett Cases, 3 ed. (1909) 110 et seq.; Hall, Int. Law, 6 ed. (1909) 158; Hall, Int. Law, 7 ed. (1917) 167n¹; Hershey, Int. L., (1912) 176; 1 Oppenheim, Int. L., 2 ed. (1912) 278; Wilson & Tucker, Int. L., (1910) 146, 147.

¹³ For discussion of the differences of opinion, see Hershey, Int. L., (1912) 176, 177n. Rejected by permanent court of arbitration at the Hague in North Atlantic Coast Fisheries, between Great Britain and United States; Hall, Int. Law, 7 ed. (1917) 167n¹. "The Doctrine of Servitudes in International Law," Pitman B. Potter; 9 Amer. J. Int. Law, 627 et seq.

¹⁴ 1685—The Republic of Genoa engaged by the treaty with France of 1685, Art. 4, to disarm a part of its vessels; Martens, G., Law of Nations, (1788) Cobbett's Trans. IV. I. In. 1713—Treaty of Utrecht, Art. 4, between England and France, provided that the Stuart Pretender should not be permitted to reside in France. 1713—Treaty of Utrecht, Art. 10. (Spain and Great Britain.) Spain confirmed British acquisition of Gibraltar but provided that neither Moors nor Jews should be allowed to reside there. 1713—Treaty of Utrecht, Art. 9, provision that the fortifications of Dunkirk should be destroyed. Confirmed by Treaty of Aix-La-Chapelle of 1748 and of Paris of 1763. Commissioners to superintend demolition were finally withdrawn under provisions of Treaty of Versailles of 1783; 1 Halleck, Int. L., 4 ed. (1908) 120; 1 Phillimore, Int. L., 3 ed. (1879-1888) 391, 392. 1807—

France by Treaty of Tilsit imposed on Prussia the obligation of not keeping more than 42,000 men under arms. 1814—Treaty of Paris, Art. XV. stipulated that Antwerp should be an exclusively commercial port, which stipulation was renewed in treaties of 1831 and 1839, erecting Belgium into a separate kingdom; 1 Phillimore, Int. L., 3 ed. (1879-1888) 392. 1815—Treaty of Paris. France agreed to demolish fortifications of Huningen and never renew them or replace them by other fortifications within three leagues of the City of Bale; 1 Halleck, Int. L., 4 ed. (1908) 120. 1816, June 26—Prossio-Netherlands boundary Treaty, Art. 19, reserved to Holland the right to continue working a certain coal mine in the parts ceded. See 8 Amer. J. Int. Law, 907, for report of a decision of the Supreme Court of Cologne relating to this case. The facts are not clear. The mine probably extended under the ceded district and the main workings were to the left of the Aix-la-Chapelle highway. A government reserved a servitude which an individual might own. 1831—Treaty of London, Art. 1, stipulated negatively that the fortresses of Menin, Ath, Mons, Philippeville and Marienburg should be demolished before Dec. 1, 1833, and affirmatively that other Belgian fortresses should be kept in repair by the King of the Belgians; 1 Phillimore, Int. L., 3 ed. (1879-1888) 392. 1856, March 30—Treaty between Russia, Turkey and the Allies, Art. 32. Russia stipulated the relinquishment of her right to construct military marine arsenals and maintain a naval force in the Black Sea. Provision modified by the Treaty of London of 1871; 2 Amer.

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notion, furthermore, that a servitude remains after a transfer of the territory as a servitude¹⁵ is believed to be a misapprehension as the obligation continues, if at all, by force of the treaty.

TERRITORY OF NO STATE.

§260. Certain land portions of the earth are not subject to the jurisdiction of any state, as the North Pole and the South Pole and many islands in the sea. The amount of such territory is very small at the present time. It was thought in Europe at one time that territory of barbarous and uncivilized tribes was territory of no state, and such territory was exploited accordingly by powerful states in the name of religion. It has already been pointed out that these tribes were states in the true sense of the word only distinguished by their lack of civilization.¹⁶ It is not to be supposed, however, that a correct apprehension of the notion of a state would have restrained the greed and self-interest of the powers of Europe. The phrase "No man's land" has long been used by international writers to describe land not subject to the jurisdiction of any state. Curiously enough, that phrase has been borrowed by the military to describe the strip of land running between the trenches of the opposing

J. Int. Law, 397; 1 Halleck, Int. L., 4 ed. (1908) 120; 1 Oppenheim, Int. L., 2 ed. (1912) 277, n.²; 1 Phillimore, Int. L., 3 ed. (1879-1888) 392. 1878—Treaty of Berlin: "Montenegro shall neither have ships of war nor flag of war;" Wilson & Tucker, Int. L., (1901) 146, 147. 1878—Treaty of Berlin, Arts. 5, 25, 35 and 44, restrict the personal supremacy of Bulgaria, Montenegro, Servia and Roumania in so far as these States are thereby obliged not to impose religious disabilities on any of their subjects; 1 Oppenheim, Int. L., 2 ed. (1912) 183, 184. 1878—Treaty of Berlin, Art. XXIV. "The administration of the maritime and sanitary police, both at Antivari and along the coast of Montenegro, shall be carried out by Austria-Hungary by means of light coast guard vessels;" Wilson & Tucker, Int. L., (1901) 146, 147. For other

instances of servitudes, see Wheaton, Elements, Dana's ed. (1866) 90; 1 Oppenheim, Int. L., 2 ed. (1912) 278, n.¹

¹⁵ "Thus, when the Alsatian town of Huningen became, in 1871, together with the whole of Alsace, German territory, the State servitude created by the Treaty of Paris, 1815, that Huningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished. Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny became French, the State servitude created by Article 92 of the Act of the Vienna Congress, 1815, that Switzerland should have temporarily during war the right to locate troops in these provinces, was not extinguished;" 1 Oppenheim, Int. L., 2 ed. (1912) 279-280.

¹⁶ See §8, §48, ante.

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forces, which strip of land is as truly not subject to the jurisdiction of any state as is the South Pole.¹⁷

NEUTRALIZED TERRITORY.

§261. Neutralized territory is territory which by treaty has been withdrawn from the operation of war, and is more particularly discussed in the chapter on neutrality.¹⁸

SUMMARY.

§262. The territory of a state consists of that part of the surface of the earth, whether water or land, over which the jurisdiction of that state extends, and it is immaterial to the idea of that jurisdiction whether the state is independent or dependent.¹ A state has an interest in its territory, and the relation of the state to that territory consists of the interest as protected by the jurisdiction.² When the study of international law began, the independent states of Western Europe existed as monarchies exercising personal and autocratic government, and the territory of the state was identified and regarded as personal individual property of the monarch, and dealt with as such by him, although even here a distinction was sometimes drawn between the property belonging to the crown and the private property of the king, and between the jurisdiction of the crown and land held by the king or the crown by a title known to the municipal law. Consequently the early writers thought the rules of the Roman law regulating immovables were applicable.³

With the advent of democracies and limited personal governments, the title of the state to its territory came to be regarded as vesting in the government of the state and subject to the control of the people. In other words, the people, as a living organism, changed their outlook and altered their organ of government accordingly, in consequence of which the members of the organism were able to assert an interest in their own territory superior to the interest which had theretofore been exercised by that organ of government and had been considered as superior to the interest of the people. The conceptions of the Roman law have, however, been retained by the writers, and although there is a close analogy between those principles and international law, some mistakes have been made by pushing the analogy too far.³ In its international aspect, the relation

¹⁷ See Hall, *Int. Law*, 6 ed. (1909) 243. See §96, ante, on jurisdiction. See §284, post, on jurisdiction over ship on open sea.

¹⁸ See §669, post. ¹ See §211, ante.

² See §212, ante. ³ See §213, ante.

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of a state to its territory has all the appearance of ownership, as that idea exists in the municipal law, and we may, with substantial accuracy, describe it accordingly, and where it is necessary to draw the distinction, use the phrases "international title" and "municipal title."⁴ The internal relation of a state to its territory consists in the exercise of the jurisdiction, as, for instance, eminent domain, police power, taxes, municipal law regulating property, etc., and is a matter entirely of municipal law, which exercise is sometimes subject to international obligations.⁵

Two independent states cannot exist in the same territory without some mutual agreement, and the cases put by the writers as supposed exceptions to this fact are really cases of a division of jurisdiction.⁶

There is no distinction between the territorial interest of an independent and a dependent state except that the interest of the latter is subject to the political power of the former, which is sometimes exercised directly on the territory of the latter, independently of the jurisdiction of the dependent state.⁷

The relation of the state to its territory originates when the state establishes and protects its interest in that territory, which may be (A) contemporaneous with the birth of the state, or (B) when the state subsequently acquires additional territory. The case under (A) loses its aspect as territorial acquisition in the larger aspect of the origin of the state, which is described elsewhere.⁸ The interest of a state in its territory is superior to all private titles to land, but the government as a corporate body may own land within the state or in another state by a title recognized by the municipal law,⁹ and such land is accurately described as the public property of the state.

The territory of a state may be all in one piece or consist of a number of non-contiguous parcels, a distinction in fact but of no importance in international law.¹⁰

The fiction of extra-territoriality has been discussed and disposed of.¹¹

The territory of a state consists of the land or water over which the jurisdiction extends, and its nature, therefore, is the same as the nature of the surface of the earth, which consists of land or water, and the phrase "territorial waters," therefore, refers to the inland waters of the territory, and the marginal waters of the open sea, sometimes described as territorial waters, will be indicated by the phrase "marginal belt."¹² No difficulty arises as to land except in

⁴ See §214, ante.

⁷ See §217, ante.

¹⁰ See §220, ante.

⁵ See §215, ante.

⁸ See §218, ante.

¹¹ See §221, ante.

⁶ See §216, ante.

⁹ See §219, ante.

¹² See §222, ante.

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connection with the subsoil and aerial space above the land. It is clear that the jurisdiction includes the subsoil on the principle that the greater includes the less, and also because of the fact that no other state can exercise jurisdiction therein without interfering with the jurisdiction over the land. The nature of the jurisdiction over aerial space is as yet involved in such complete obscurity that no statement can be ventured.¹³

The principal discussion arises concerning the jurisdiction over water, which is either entirely within the territory of a state, in which case the water is within the jurisdiction of that state, or lying between two or more states, where the jurisdiction of the co-riparian states must be adjusted.¹⁴ The waters of the earth may be described under the headings of the open sea, the shores and boundaries of the open sea, which are discussed in the next chapter, and canals,^{14a} rivers, lakes and landlocked seas.

Rivers are of several kinds: (A) intrastate, which are clearly within the jurisdiction of the state within which they flow. (B) Interstate rivers, which are of two kinds: (a) those flowing through two or more states, in which case the states are in the same position as upper and lower riparian owners of a stream,¹ (b) rivers flowing between two or more states, or boundary rivers. Rivers of this kind are regulated by treaty between riparian states, and where there is no treaty, the usual presumptions of the Roman law as to co-riparian owners of a stream apply,² which presumptions, it is to be noted, are presumptions of fact. All rivers are now open to navigation by unilateral act of the state or by treaty, the self-interest of the state being the principal compelling factor in the opening.³ Lakes are bodies of water which may or may not be connected with the open sea, and when entirely surrounded by the territory of a state are inland waters of that state, and no other state has any jurisdiction therein. When surrounded by the territory of several states, there must be an adjustment, which is usually by treaty, as in the case of boundary rivers. When the water is connected with the open sea by navigable channel, the same considerations apply as in the case of rivers.⁴

The boundary of the territory of a state in an imaginary line on the surface of the earth which confines the limits of the jurisdiction of the state. Where the line is marked by artificial objects, as posts,

¹³ See §224, ante. ^{14a} See §226, ante.

¹⁴ See §225, ante. ¹ See §229, ante.

² See §230, ante.

³ See §228, ante.

⁴ See §231, ante.

monuments, etc., it is said to be artificial, and when marked by natural objects, as mountains and rivers and lakes, it is said to be natural. The distinctions, however, are not in the boundary but in the objects by which it is marked. When the boundary has not been surveyed but is described as following certain natural objects, there are a number of presumptions of fact which apply in the absence of anything to the contrary.⁵

State territory which is bounded by water may be increased or diminished by the action of the water, which is accretion or alluvion, and in which case the presumptions of the Roman law are generally applicable.⁶

State territory may also be increased or diminished by the act of state. We have the case of (A) acquisition of territory of no state, (B) of territory already belonging to another state, which latter case involves a transfer between two states, and the same transaction which increases the territory of one state decreases the territory of the other.⁷ The act of acquisition of transfer is a state act, and the organ of government appropriate, as well as the exercise of the jurisdiction over the acquired territory is a matter of municipal law. The acquisition consists in establishing the jurisdiction of the state to protect its interest. When the territory belongs to no state, there is no displacement of any jurisdiction. Where it belongs to another state, there is such a displacement but the acquisition is the same in each case, the only distinction being in the antecedent facts.⁹

The case of the acquisition of territory not belonging to any state is a matter of historical interest, as the entire surface of the earth is pretty well divided at the present time among the various international persons. Such territory was acquired by the simple act of setting up the jurisdiction of the state therein, commonly described as an occupation, which necessarily, where the land was previously unknown, had to be preceded by discovery by someone. The setting up of the jurisdiction was a fact, and the questions as to occupation which have arisen are simply questions of fact.¹⁰

In the case of a transfer from one state to another, there is a loss of territory by one state and a gain by another, the two states retaining their previous international aspect, and therefore to be distinguished from merger or separation of states, where there is a transfer of territory also, but which transfer is lost sight of in the

⁵ See §233, ante.

⁶ See §234, ante.

¹⁰ See §238, ante.

⁷ See §235, ante.

⁹ See §236, ante.

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more important aspect of the birth or extinction of a state. These cases of transfer may be arranged under the following headings: (A) Conquest of territory, involuntary alienation, (a) Followed by treaty of cession ratifying the conquest, (b) Without being followed by any treaty; (B) Belligerent occupation from which the invader withdraws on or before the treaty of peace; (C) Voluntary transfer by treaty of cession, followed by the actual transfer of the territory. In (A) the possession precedes the treaty of cession; in (B) possession is taken and abandoned; in (C) the cession precedes the taking of possession. We shall consider these cases together under the various headings which will arise.¹¹

There is no rule of international law restraining in any way the alienation of state territory, that is to say, all such territory is internationally freely alienable, although some of the writers have strangely enough entertained a notion to the contrary. The municipal law of a state may impose restrictions on the alienation of state territory or prescribe the manner in which that territory may be disposed of. These are restrictions imposed by the people on their organ of government entirely of a municipal aspect, and having no international effect of making state territory inalienable. Such restrictions will be more frequent in limited monarchies and republics than in the case of autocratic governments, although instances have occurred where the people of a state have repudiated the transfer made by the potentate who governed it.¹²

The transfer may be voluntary or involuntary, which are difficult to distinguish in fact, and have the same aspect in international life. The accomplished fact of a transfer is sufficient for the international lawyer who has no concern with the ethics or accompanying political circumstances of the transaction. It has been supposed by some of the writers that by legal fiction involuntary transfers are regarded as voluntary. The notion is without weight as it implies that an involuntary transfer would have a different aspect, which is not the case in fact or in international law.¹³ The conceptions of a conquest of subjugation are immaterial in this connection, as we are only concerned with the circumstance that the transfer is forced, which may as well be accomplished by diplomatic pressure as by force of arms.¹³

It is somewhat difficult to describe in the language of international law the form of transfer. The transfer consists in fact of a transfer of the jurisdiction exactly analogous to the transfer of possession

¹¹ See §239, ante.

¹² See §240, ante.

¹³ See §241, ante.

in the municipal law and livery of seizin of the English common law. The transfer may, as we have noted, take place without a formal document, as a treaty of transfer, or may be preceded or followed by such a document. The term "cession" is applied by the international writers indiscriminately to a transfer of state territory, without indicating whether the word describes the formal document or the physical transfer of the jurisdiction or is intended to express both ideas, and generally used without regard to whether the transfer is voluntary or involuntary.¹

The transfer of the jurisdiction, except where there is a conquest, usually follows as a separate act after the execution of the treaty providing for the transfer, and is an occasion for more or less formal ceremony on the territory transferred, as firing of guns, running down flag of transferring state and hoisting flag of the state to which the territory is transferred. The treaty of transfer may be words in *praesenti* actually handing over the territory, just as the words of conveyance in an ordinary deed at common law convey the property described. The transferring state may thereafter have nothing to do with the territory, and the state to which the transfer is made will be at liberty to take possession whenever it sees fit and in such manner as it may prescribe.²

The notion that a lease or administrative occupation may be described as a disguised cession seems to be entirely fanciful, as the facts are entirely different, and there seems to be no reason for coloring one with the aspect of the other.

Territory was transferred and disposed of by potentates of Western Europe without the slightest regard to the wishes of the inhabitants of the ceded territory. With the rise of democracy, the people demanded that they should be allowed to have some part in the transaction, and the principle has been urged that no transfer of state territory is valid without consent of the inhabitants. While it is perhaps too much to say that there is a principle of international law applicable, yet there is no doubt that modern practice is conforming to the view of hearing the voice of the people in the transaction.³

There seems to be no question of capacity to make a conveyance among international persons, as that term is used in the municipal law. All states are living organisms having the same international aspect, although exhibiting different peculiarities, and some of them

¹ See §242, ante.

² See §242, ante.

³ See §243, ante.

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are hampered in their participation in international life by the form of their government and others are not able to participate fully in international affairs owing to organic defects, that is, lack of civilization. There is something, however, to be said about international parties to a transfer with reference to the different classes of states and different forms of government.⁴

Among absolute monarchies, state territory was, as we have already remarked, regarded as the personal property of the king and was disposed of by will, gift, sale, marriage settlement, and acquired by dowry, just as is private property at municipal law. These dispositions are now a matter purely of historical interest and of very rare occurrence in recent years.⁵ Belligerent and insurgent communities⁶ and *de facto*⁷ governments cannot make any transfer which will be valid as against the parent or *de jure* government unless they are successful in displacing the latter and asserting their independence. Every such disposition, therefore, by a state of this kind must be regarded by the state to which the transfer is made as voidable by the parent government if the belligerent or insurgent community is unsuccessful. Uncivilized tribes were regarded by the monarchs of Western Europe with contempt and arrogance, and territory was taken from them generally by force or fraud without any regard to the wishes or convenience of the inhabitants. It was supposed by some writers that such states lack a capacity to convey, which was only a sophistry put forward to excuse their despoliation by the civilized powers of Western Europe.⁸ No case appears to have arisen of a transfer by a neutralized state and the question whether such a transfer would be valid seems to depend upon the terms of the treaty neutralizing the state, and whether that treaty did or did not deprive the neutralized state of its international function.⁹

Where a transfer is made by the belligerent to a neutral, the question will arise whether the acceptance of the transfer by the neutral involves a departure from the principle of neutrality, and is discussed more properly under that heading.¹⁰

A dependent state may dispose of its territory in the international world to an independent state or another dependent state, according to the provisions of the municipal law, which is determined by the relation between it and the independent state on which it is dependent.¹¹

⁴ See §244, ante.⁵ See §245, ante.⁶ See §248, ante.⁷ See §249, ante.⁸ See §247, ante.⁹ See §250, ante.¹⁰ See §251, ante.¹¹ See §252, ante.

The effect of the transfer of state territory is of importance, and the question arises as to the effect of the transfer (A) as between the parties, (B) as to third states, (C) as to the inhabitants and municipal law of the territory ceded.¹²

As to the municipal law of the territory and as between the parties, the effect of the transfer is entirely regulated by the provisions of the treaty of transfer and by the act of the transferring or transferee state, which may make such provisions as they see fit. The municipal law governing the ceded territory is formed before the transfer by the transferor state, and after the transfer by the transferee, and therefore is entirely a matter of municipal discretion.¹³

The transfer will have an effect upon the international membership of the inhabitants because before the transfer they were to a greater or less extent members of the transferring state. After the transfer they have lost that relationship to that state and are now in a position to assume that relation to the transferee state. The question therefore arises whether by the act of transfer between the states, the membership of these inhabitants is changed. The medieval practice was to pay no attention whatever to the comfort, convenience or wishes of the inhabitants, and immediately upon the cession, the transferee state imposed its authority upon the inhabitants and considered them as its members to do with as it pleased. Gradually, however, the view obtained weight that the inhabitants of such territory should have an option of determining whether they would become members of the new state or not and given an opportunity to migrate out of the territory if they did not wish to become members of the transferee state. Provisions were inserted in treaties giving this option to the inhabitants, and the practice in modern times generally is to make such provisions in the treaty of transfer. Where the transfer is involuntary, as by conquest, a somewhat different question arises. The inhabitants are there torn by force from their membership in the state, and bodily incorporated into another state. Even here, the treaty of peace concluding the war will frequently contain a clause giving such inhabitants an option. The arguments on behalf of the inhabitants are, however, somewhat weaker in the case of an involuntary transfer than in the case of a voluntary transfer. Cases of involuntary transfer are, however, becoming rarer in modern times, and it may be that the near future will see the establishment of such principles in international life which will com-

¹² See §253, ante.

¹³ See §254, ante.

pletely prevent any future rape of territory from one state by another. The question is of diminishing importance, in view of the greater liberty allowed aliens in modern times.¹⁴

The question will also arise as to the effect when the treaty provides for a formal handing over of possession at a subsequent date, and acts are performed by transferror government relative to the ceded territory between the date of the treaty and the actual handing over of possession. Not many cases have occurred raising this question, but in those which have, which were concerning the acts of the Spanish Government in the ceded territories of Florida and Louisiana, it was held by the Supreme Court of the United States that Spain, as the transferror government, could not exercise any act within the ceded territory, as the granting of title to lands, but the officers could continue to perform their ordinary functions relating to the government of the territory ceded.¹⁵

If the treaty obligations of the transferror state in any way relate to the territory ceded in such a manner that the cession of the territory makes it impossible for the transferror state to continue the performance of the treaty, and puts it in the power of the transferee state to continue that performance, it is usual to arrange in the treaty of transfer for the assumption of that obligation by the transferee state. In making such arrangement, the states concerned are influenced by the factors influencing international conduct, and the same factors impelling the observance of the terms of the treaty applied in this case induce in the transferring parties a desire to fulfill the terms of the treaty in such manner as is most practicable.¹

Third states also may be concerned in preventing a transfer between two other states or may be active in compelling one state to transfer to another. The action of the third state in such a case is induced by political considerations and sometimes by a desire to preserve or restore the balance of power, and therefore seems to have no particular importance in international law.²

Prescription does not apply in international life in the same sense in which it is applicable in municipal law because the doctrine of prescription cuts off the right of action by the party precluded by the running of the time, and since there is no political power superior to the independent states furnishing an organ of redress in such cases, there is no determinate authority which can say that the power of the state to obtain redress has been lost. Furthermore, since

¹⁴ See §256, ante. ¹⁵ See §255, ante. ¹ See §256, ante. ² See §257, ante.

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international law is in a state of self-help, and each independent state is competent to set in motion the factors of conduct in its discretion, there seems to be no limit of time within which such action may be taken. There is, however, no doubt that a long continued state of affairs produces in the human mind an impression which leads to an acquiescence in the continuance of those facts. Therefore, when a state has been in possession of territory for a long period of time, even though it has been acquired by violence in the beginning, there is less likelihood of the state from which the territory has been taken attempting to retake the territory than there is soon after the act of conquest. This, however, is simply a phenomenon of human nature which exists in municipal as well as international life, and illustrates the force of precedent and custom upon the human mind.³

It sometimes happens that agreements will be made between states calling for the doing of acts upon each other's territory which present cases analogous to those of the servitude or easement of the municipal law. The attempt to apply the municipal law of servitudes, however, seems unfortunate and without practical result, since in international relations each case depends entirely on the terms of the treaty between the state, and leaves no room for the application of the doctrines of implied grant, etc., which play so large a part in the municipal law of servitudes.⁴

Territory of no state is that territory which does not belong to any state. Most of the surface of the earth is now divided among the states of the world, and the only unoccupied territory is the North Pole and the South Pole and some small islands in the sea.⁵ Neutralized territory is that territory which has been set apart as neutral by agreement between the several states, and is distinguished from a neutralized state, in which case the entire state organism is neutralized, while in this case only a particular piece of territory is neutralized.⁶

³ See §258, ante.

⁴ See §259, ante.

⁵ See §260, ante.

⁶ See §261, ante.

CHAPTER 6.

THE OPEN SEA AND BRANCHES THEREOF, AND THE MARITIME BELT.

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PRELIMINARY.

§275. The open sea and the branches thereof and the maritime belt require separate discussion because no state has the same exclusive jurisdiction in these places that it has in its landed territory. We shall define the open sea and the maritime belt, examine the nature of the jurisdiction of a state therein, and refer to the peculiar circumstances which may occur in these places. First it is necessary to say a few words as to maritime and non-maritime states.

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MARITIME AND NON-MARITIME STATES.

§276. A maritime state is a state a part of whose territory abuts on the open sea or a branch thereof, and a non-maritime state is a state whose territory is entirely enclosed by the landed territory of another state. There is, therefore, a difference in the interests of the two kinds of states in the open sea. The interest of a maritime state is clear, and the subject of the discussion in this chapter. A non-maritime state cannot have any maritime belt and can have no access to the open sea except through the jurisdiction of another state. There is grave doubt, therefore, whether such a state has any interest at all in the open sea. No question has been raised, however, because no non-maritime state has, so far as we have been able to discover, attempted to assert any interest in the open sea. All states have used their utmost endeavors to obtain territory on the sea.¹

DEFINITION OF THE OPEN SEA.

§277. The sea is the great body of salt water covering the greater part of the earth's surface, and is referred to by international lawyers as the high sea or the open sea. Very few writers have defined the open sea as it is an object so obvious and well known that any definition seems superfluous; a few, however, are collected in the note.²

¹ A small maritime state may be restricted by the provisions of a treaty to a mercantile flag, as, for instance, Montenegro, by Art. 29 of the Treaty of Berlin of 1878. There is some doubt as to whether these restrictions still exist; 1 Oppenheim, Int. L., 2 ed. (1912) 327, n³. Switzerland is the principal non-maritime state, and the question has been discussed in that country as to the advisability of adopting a maritime flag, which, however, has entirely been a municipal discussion and has raised no controversy in international life; 1 Oppenheim, Int. L., 2 ed. (1912) 326, 327; Twiss, L. of Nations, Peace, 2 ed. (1884) 327-329. The two other non-maritime states are Paraguay and Bolivia in South America.

² Field defines in article 53: "The High Seas are the ocean, and all con-

necting arms and bays or other extensions thereof not within the territorial limits of any nation whatever;" 1 Oppenheim, Int. L., 2 ed. (1912) 321, n. 1. See Resolutions of the Institute of International Law, at meeting of 1894, Carnegie Ed., 113. "Open sea or high sea is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs and bays, which are parts of the sea, but not parts of the open sea. Wherever there is a salt-water sea on the globe, it is part of the open sea, provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and provided that the salt water approach to it is navigable and open to vessels of all nations. The enclosure of a sea by the land of one

USE OF THE OPEN SEA.

§278. The high sea may be used only for navigation and fishing, and vessels alone are the subjects of jurisdiction therein because nothing else can exist there except momentarily. It is not physically capable of being possessed in the same way as land is, and much of the learning on the nature of state jurisdiction over the open sea is based on these peculiar circumstances,³ but it is doubtful, as will be noted in the next section, how far such considerations are really in point. The bed of the open sea may be used for submarine cables, as to which no question has arisen except as to the use of such cables in time of war. The space over the open sea may be used for flying, but as that art is yet in its infancy, no questions have arisen. The use of the sea, the subsoil and the air space, is limited only by the inventive genius of man.

JURISDICTION OF A STATE IN THE OPEN SEA.

§279. The jurisdiction of a state over the open sea is the exercise of its power thereon in protection of any interest it may have therein.

and the same State does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more littoral states. Whereas, therefore, the Dead Sea is Turkish and the Aral Sea is Russian territory, the Sea of Marmora is part of the Open Sea, although it is surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are now open to merchantmen of all nations. For the same reason the Black Sea is now part of the open sea. On the other hand, the Sea of Azoff is not part of the open sea, but Russian territory, although there exists a navigable connection between it and the Black Sea. The reason is that this connection, the Strait of Kertch, is not according to the Law of Nations open to vessels of all nations, since the Sea of Azoff is less a sea than a mere gulf

of the Black Sea;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 321. "The open sea includes the Atlantic, Pacific, Indian, Arctic and Antarctic Oceans, the North Sea, the English Channel and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea, and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal; the China Sea; the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, the Sea of Japan, and the Sea of Okhotsk; the Behring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 322.

³ Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. II. III.; Hall, *Int. Law*, 6 ed. (1909) 149; 1 Westlake, *Int. L.*, 2 ed. (1910) 164; Vattel, (1758) Chitty's *Trans.* Book I. §279.

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Jurisdiction in Open Sea

A state has a certain specific interest in its vessels on the sea, and in the natural products, as fish, as well as a general and more indefinite interest in the sea as a whole. At the present time the jurisdiction of each state is confined to its particular specific interest in a vessel on the sea or a submarine cable in the bed of the sea, and no state has any jurisdiction co-extensive with its general interest in the whole sea. The nature of this jurisdiction has been the subject of much discussion among the writers, and they appear generally to have missed the real point involved.⁴ When tribal jurisdiction prevailed and all states were roving, the sea was not subject to the jurisdiction of any tribe any more than the land was. When the various organizations of men subsequently settled down on definite portions of the earth, they did not occupy the sea because that was impossible.

Primitive man would have regarded the present territorial extent of a state as inconceivable. The development of the art of horseback riding was probably the beginning of territorial dominion, just as the improvement in art of navigation was the beginning of extensive use of the sea. It is not at all impossible to imagine a state exercising exclusive jurisdiction over the whole sea; it is simply a question of sea power. The development of this question is economic rather than proceeding upon any legal grounds. In the fourteenth and fifteenth centuries, Spain exercised complete dominion over all Eastern seas and for a long time controlled the route around the Cape of Good Hope. The chief discussion over the freedom of the seas occurred in the sixteenth century when the Dutch and English broke the Spanish monopoly. They broke it, however, by force and not by any legal argument. After the fall of the Roman Empire, there was anarchy on the high seas as well as on land, and the jurisdiction of the several independent states seems to have grown up by gradually acquiring control of the private fleets of merchant ships which navigated the sea.⁵

CLAIMS TO JURISDICTION OVER THE OPEN SEA.

§280. Many claims were made to a control over portions of the high sea, but no power seems to have set up a claim to the whole sea.⁶

⁴ Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. II. III.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 329 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 284; Vattel, (1758) Chitty's Trans. Book I. §280; Woolsey, *Int. L.*, 6 ed.

(1897) 72; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. III. 2.

⁵ Twiss, *War*, 2 ed., (1875) 142.

⁶ 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 257. The Portuguese claimed control over all ships sailing in the seas

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These pretensions gradually disappeared with the growth of commerce. Many ingenious reasons were advanced for and against the various claims which were made, and there is a great deal of obsolete learning on the subject.⁷ These arguments may be

of Guiana and the two Indies. The Spaniards claimed a similar right over the Pacific Ocean. The Dutch sought to prevent the Spaniards going to the Philippines from passing around the Cape of Good Hope. 1821—Russia claimed all the Pacific Ocean North of 51 degrees of latitude on American shore. The claims were resisted by the United States of America and Great Britain and given up in conventions of 1824–1825; and the United States, after the purchase of Alaska, claimed jurisdiction over the Behring Sea, which claim was dropped at an early stage of the Behring Sea arbitration proceedings, and claim of control for different purpose substituted. See Hall, *Int. Law*, 6 ed. (1909) 140, 148; Lawrence, *Int. Law*, 5 ed. (1913) 187 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 320; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 249 et seq.; Walker, *Science, Int. L.*, (1898) 167–173; 1 Westlake, *Int. L.*, 2 ed. (1910) 166. Great Britain claimed the Channel, the North Sea, the seas outside Ireland, the Bay of Biscay, and ocean to the north of Scotland. The Dutch sometimes admitted the English rights, but France never formally admitted the English pretensions; 1 Halleck, *Int. L.*, 4 ed. (1908) 134n²; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 264. For extract from instructions of Queen Elizabeth to her ambassador to Denmark for illustration of the English view, see 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 265 et seq. Baltic was shared between Denmark and Sweden. Denmark claimed the whole space between Iceland and Norway. For discussion of the Danish pretensions, see 1 Philli-

more, *Int. L.*, 3 ed. (1879–1888) 267 et seq. 1485—Treaty between Denmark and England to the effect that English vessels should fish in and sail over the seas between Norway and Iceland upon taking out a license which required to be renewed every three years. In the 16th century, Great Britain had so long enjoyed these fisheries without opposition, owing to internal wars in Scandinavia, that the former set up a title to their use by prescription, which was opposed by the Danes; Hall, *Int. Law*, 6 ed. (1909) 141, n.¹ Venice claimed the Adriatic; 1 Halleck, *Int. L.*, 4 ed. (1908) 135n. In 1269, Venice began levying tolls from vessels navigating the Northern Adriatic; Hall, *Int. Law*, 6 ed. (1909) 141. Turkey claimed the Black Sea; 1 Halleck, *Int. L.*, 4 ed. (1908) 180, 181. Genoa claimed the Ligurian Sea. Russia in 1821 claimed 100 miles off the coast of its Asiatic shore; Hall, *Int. Law*, 6 ed. (1909) 148. 1790—British claim over Nootka Sound against Spain; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 251. 1731, March 16—Treaty of Vienna. House of Austria renounced, in favor of England, the right to send vessels from the Netherlands to the East Indies; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 149; Vattel, (1758) Chitty's *Trans.* Book I. §284. See Hershey, *Int. L.*, (1912) 215; 1 Halleck, *Int. L.*, 4 ed. (1908) 134n²; Lawrence, *Int. Law*, 5 ed. (1913) 192 et seq.; Martens, *G., Law of Nations*, (1788) Cobbett's *Trans.* IV. IV. 5–14.

⁷ Hall, *Int. Law*, 6 ed. (1909) 140–148; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 15 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 247 et seq., 258 et seq.;

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regarded as expressions of the operation of natural and economic facts. Perhaps the greatest single factor in modern civilization is the development of means of transportation. That factor has had its influence here, and the immense increase in commerce which resulted imperatively demanded the freedom of the seas.⁸ We have occasion elsewhere to note the manner in which commerce has affected international relations.⁹

THE FREEDOM OF THE SEA.

§281. When we speak of the freedom of the sea, it must be understood that the sea is free only to an independent state or to such of its members as have complied with its maritime regulations with respect to registry and privilege of flying the merchant flag. The sea is not free to an individual to sail thereon at his own free will in such boat and under such auspices as he may see fit.¹⁰ An individual so proceeding is a trespasser upon the open sea and liable to be considered as a pirate.¹¹ The sea, therefore, is closed to persons who have not complied with the maritime regulations of some independent state entitling them to fly the flag of that state. Since this is the universal practice, the public ships of every independent state have exercised the power of verifying the title of any private ship found in the open sea to sail under the colors which it displays because if it is not entitled to use those colors or any colors, it may be arrested and taken into port for condemnation.¹² The sea is free to the independent states of the world to the extent that they do not interfere with each other in navigation or fishing therein. The cases of interference will only be between ships, which is discussed in a subsequent section.¹³

Twiss, *L. of Nations, Peace*, 2 ed. (1884) 295; Wheaton, *Elements*, Dana's ed. (1866) 267 et seq. It has been supposed by some authors, e. g., R. Mason Lisle, 51 *Legal Intelligencer*, 802, that the various claims to portions of the open sea were founded in part upon service rendered to commerce in protection given against pirates, as a consequence of which a certain power of control was recognized by all maritime states and from which arose the custom of levying tolls and dues to recompense the protecting state for

the cost and trouble to which it was put.

⁸ See next section.

⁹ See §§457, 552, 604, 665, 732, 802, 877, post.

¹⁰ Hershey, *Int. L.*, (1912) 215; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 323-328; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 291.

¹¹ See §286 et seq., post, as to piracy.

¹² See §297, post.

¹³ See §292, post. "Freedom of the Land and Freedom of the Seas," Theodore S. Woolsey, 28 *Yale Law*

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Navigation of the Open Sea.

PRELIMINARY: KINDS OF VESSELS.

§282. The sea is principally used for navigation, and vessels are of two kinds, public and private, and the distinction between them is of great importance and will be frequently referred to. We shall discuss the identification of a ship, that is, the means of determining to what state it belongs and whether it is a public or private ship,¹⁴ and then refer to the principles applicable to these two kinds of vessels.

IDENTIFICATION OF A SHIP.

§283. Since the sea is free only to independent states or their members, it follows that every ship on the sea must in fact be a member of some state, that is, it must be entitled to fly the flag of that state. Before the rise of the modern states of Europe, merchantmen on the high sea were thrown on their own resources just as they were on land,¹⁵ and flags were carried denoting the ownership of the vessel. The date of the beginning of the carrying of a flag of a state is not clear, but has been placed at about the thirteenth century,¹⁶ and was probably coincident with the rise of state governments able to protect their members on the sea, which protection was indicated by the flag of the state. The practice of vessels of war carrying a national ensign was probably introduced at the time of the crusades.¹⁷

Jour. 151. "The Freedom of the Seas," Grotius (1608), Carnegie Trans. (1916). "The Freedom of the Seas," R. Mason Lisle, 51 L. I. Phila., 802 et seq. "The Freedom of the Seas," (1919) Louise Fargo Brown. "The German Conception of the Freedom of the Sea," Amos S. Hershey; 13 Amer. J. Int. Law, 207. "De Internationalisierung der Meerengen und Kanäle," (1918) Rudolph Laun. See 13 Amer. J. Int. Law, 373. "What is Meant by the Freedom of the Seas," Arthur Garfield Hays; 12 Amer. J. Int. Law, 283.

¹⁴ The distinction between them is very ancient; Twiss, War, 2 ed. (1875) 142; Wheaton, Elements, Dana's ed. (1866) 160.

¹⁵ Twiss, War, 2 ed., (1875) 142, 143.

¹⁶ Twiss, L. of Nations, Peace, 2 ed. (1884) 321-327. See Resolutions of the Institute of International Law, at meeting of 1896, Carnegie Ed., 135.

¹⁷ Some states are by treaty given a mercantile marine flag, but no flag of war, being precluded by the treaty from fitting out any vessels of war, e. g., Montenegro, by Treaty of Berlin, of 1878. As to flag of the Ionian Islands, free cities of Germany, Samos, and Egypt, flag of Jerusalem or flag of the Holy Land, see Twiss, L. of Nations, Peace, 2 ed. (1884) 323-327. The union flag for British ships was first adopted in 1603 on union of Scottish and English crowns; Twiss, L. of Nations, Peace, 2 ed. (1884) 323-327.

A public vessel is one in the service of a state commanded by an officer commissioned by the state under such rules and regulations as the municipal law may provide. The use of the ship is immaterial. It may be a merchantman, fishing boat or yacht, and the officer in command need not be an officer of the regular naval forces.¹⁸ It is sufficient to identify it as a public ship if it is commissioned by the state as such a ship and recognized by it accordingly. In most maritime states, a special flag is used for ships in the public service so that they are always easily recognized.¹ A private vessel is a ship owned by private individuals and not commissioned by the state, and engaged in such private venture as the owner may desire.² All such ships are, as before mentioned, registered by provisions of the municipal law of each state and carry the papers which such law requires them to have on board,³ as to which there is a substantial but not exact uniformity.

A ship, therefore, on the high sea without such registry and papers is a ship of no state, is not under the protection of the political power of any state, no state has any interest in it, and it has therefore no

¹⁸ Wilson, *Int. L.*, (1910) 117, draws the distinction of semi-public vessels, which he says are those engaged in service which is of value to all states, as postal vessels and exploring expeditions. The distinction is doubtful, and of no value. Explorations may be public or private.

¹ The attestation by the government is conclusive of the character of the public ship, and the word of the commander is usually regarded as sufficient; Hall, *Int. Law*, 6 ed. (1909) 160, 161, n.¹

² "Private vessels belonging to a state are those which, belonging to private owners satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain or the composition of the crew;" Hall, *Int. Law*, 6 ed. (1909) 163. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 331, says that "all states with a maritime flag are by the law of nations obliged to make private

vessels sailing under their flags carry so-called 'ship's papers.'" This is a misleading statement. It is not because of any provision of the supposed law of nations, but owing to the operation of the international factors of conduct, which effectually prevent any ship sailing the high sea unless it flies the flag of some state. It is not, therefore, that the state is compelled to make the private vessels have the papers and carry the flag, but that the private vessel is compelled to comply with the municipal law of a state in order to escape destruction on the high sea.

³ The papers expected to be on board as evidence of the character of the vessel are: (1) The register; (2) the crew and passenger list; (3) the log book; (4) a bill of health; (5) the manifest of cargo; (6) a charter party, if the vessel is chartered; (7) invoices and bills of lading; Wilson & Tucker, *Int. L.*, (1901) 312; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 331; Twiss, *War*, 2 ed., (1875) 172 et seq.

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power to navigate the high sea as against the objection of any independent state, that is to say, if any independent state seizes such a ship, destroys it or otherwise interferes with its navigation on the high sea, it can have no remedy by appealing to the protection of any state. Private vessels, therefore, are identified by the papers on board, and public ships by the flag and commission of the commander.⁴

Jurisdiction of a State Over its Vessels.

NATURE OF THE JURISDICTION.

§284. The nature of the jurisdiction of a state over its vessels on the open sea has been much discussed and a number of theories have been advanced.⁵ It has been supposed, for instance, that the vessel is a floating part of the state, a prolongation thereof, and therefore carries with it the jurisdiction exercised by the state within its own borders.⁶ This is simply the extra-territorial theory in another form.⁷ There is more room for this notion in the case of the open sea because the ship does not while navigating thereon meet with the territory of any state, and therefore there is no obstacle in fact to the exercise of the imagination in supposing that the ship is part of the territory of the state. It has also been argued that the state exercises a personal jurisdiction over the ship. The state exercises a jurisdiction on the ship, but not over the ship itself, which is an inanimate object and therefore not subject to the direct operation of the political power of any state.

The real explanation is believed to be this: the ship leaves the jurisdiction of its own state and enters upon the high sea subject

⁴ See as to so called nationality of a ship; 2 Moore, *Dig. of Int. L.*, (1906) 1002-1043; 1 Westlake, *Int. L.*, 2 ed. (1910) 168 et seq.; Wilson & Tucker, *Int. L.*, (1901) 117.

⁵ Hall, *Int. Law*, 6 ed. (1909) 244 et seq.; Hershey, *Int. L.*, (1912) 220.

⁶ Woolsey, *Int. L.*, 6 ed. (1897) 72, partly accepts.

⁷ Hall, *Int. Law*, 6 ed. (1909) 245-249, rejects notion of; Walker, *Science*,

Int. L., (1898) 403, accord. For discussion of the territorial principle as applied to merchant ships to sustain their exemption from seizure by a belligerent in time of war, see Twiss, *War*, 2 ed., (1875) 166. See §221, ante, on extra-territoriality. For a good statement of the objection to the fiction as respects war vessels, see 1 Halleck, *Int. L.*, 4 ed. (1908) 232, 233.

to the authority of the captain, who must exercise his power in subordination to the jurisdiction of the state of which he is a member while within the maritime belt, and must in like manner exercise that jurisdiction on the high sea. If on the high sea he does not, he is liable to the penalties of piracy. Therefore, the jurisdiction of the state, which is always personal, is exercised directly on the ship by the captain in its name, who is responsible for the time being. There is in fact, therefore, an exercise of that state jurisdiction at all times while the ship is on the high sea and wherever it is. The practice and theory of seizing pirates is not only directed to making the sea safe for commerce, but is also an aid furnished by each state to the jurisdiction exercised by every other state over its ships on the high sea. It is a mistaken idea to assume that the state can only exercise jurisdiction on the ship when it returns to a home port. That jurisdiction is exercised so long as the captain retains his authority and exercises it in subordination to the jurisdiction of his own state.⁸ So where the crew leave the ship in mid-ocean, it becomes an abandoned hulk, and the jurisdiction of the state ceases to exist.⁹

Suppose a murder is committed on a private ship at sea and the vessel never returns to its home port but remains permanently in a foreign jurisdiction when off the high seas or in territory of no state. The state from which the ship originally came cannot punish the murderer because he never comes within its political power, assuming that the murderer stays with the ship. No other state can punish the murderer because the murder was not committed within its jurisdiction nor on the high seas on any ship over which it had jurisdiction before the ship started out. To punish the murderer in such case therefore would be an invasion of the jurisdiction of the other state.¹⁰

⁸ As to jurisdiction over vessel, see Hershey, *Int. L.*, (1912) 221; 1 Moore, *Dig. of Int. L.*, (1906) 930-939; 2 Moore, *Dig. of Int. L.*, (1906) 272 et seq.; Twiss, *War*, 2 ed., (1875) 166 et seq.; Vattel, (1758) Chitty's *Trans. Book I.* §216; Wheaton, *Elements*, Dana's ed. (1866) 169 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 167.

⁹ Woolsey, *Int. L.*, 6 ed. (1897) 72.

¹⁰ There is, however, no foundation for the notion advanced by some

authors *e. g.*, R. Mason Lisle, 51 *Leg. Int.*, 802, that the jurisdiction of the state extends to the water beneath the ship on the open sea. The jurisdiction is, as we have pointed out, personal, extending only to the persons on the vessel. How it is possible for a state to in any way determine the movement of the waters under the ship is difficult to see. The notion is believed to be entirely without weight.

DISTINCTION BETWEEN PUBLIC AND PRIVATE VESSELS.

§285. A distinction has been drawn between the jurisdiction over private and public vessels¹¹ although some authors failed to observe it. The only distinction is that the public ship, when an armed ship of war, is under the discipline of the armed forces of the state, and therefore the jurisdiction of the state therein is more direct and forcible than the case of a private ship. The principal distinction between the two kinds of vessels lies in the fact that the public vessel represents the dignity, honor and independence of the state, and is an agent of the state for the performance of state acts on the high sea, and therefore it may perpetrate acts of international violence¹² in time of war, and may in time of peace police the high seas, whereas a private ship has no authority to perform any state act and cannot, except in certain cases, participate in international violence.¹³

A private vessel is subject to more acts of interference on the high sea under the factors of international conduct than a public vessel is. There is, it is apprehended an error in saying that the jurisdiction over the private vessel is less absolute and complete.¹⁴ The jurisdiction is the same in each case, in the public ship aided by naval discipline, in private subject to the liability of being interfered with on the high sea under certain circumstances.¹⁵

Maritime ceremonies in the open sea depend entirely on comity and are considered as taking place between equals, entirely apart from any question of jurisdiction. The several independent states of the world have, as a part of their naval regulations, elaborate provisions as to the salutes and honors to be paid on the high seas.¹⁶

¹¹ Wheaton, Elements, Dana's ed. (1866) 160 et seq.

¹² See §603, post, on international violence.

¹³ See §750, post, on armed merchantmen. See §748, post, on privateers. See §750, post, on private ship resisting hostilities. See §962, post, on neutral ships.

¹⁴ E. g., Hershey, Int. L., (1912) 221.

¹⁵ The cases of interference are as follows:

Policing high seas..... §297

Self preservation..... §298

Black slave trade..... §299

¹⁶ See 1 Halleck, Int. L., 4 ed. (1908) 135-152; 2 Phillimore, Int. L., 3 ed. (1879-1888) 53-57; Twiss, L. of Nations, Peace, 2 ed. (1884) 316-319; Wheaton, Elements, Dana's ed. (1866) 237, 238; Woolsey, Int. L., 6 ed. (1897) 121 et seq.; Zouche, L. of Nations (1650), Carnegie ed., Part II. VIII. 14.

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Piracy.**PRELIMINARY.**

§286. The case of piracy is nearly obsolete as a practical matter and rarely engages the attention of the international world at the present time. It is necessary, however, to devote some space to it as there are several current ambiguities and misconceptions against which the learned reader should be put on his guard. In its proper setting it forms an interesting incident in the history of international life and a clear illustration of the proper conception of the phrase "freedom of the sea." We shall first define piracy, point out the distinction between piracy by international law and piracy by municipal law, refer to the status of vessels of belligerent communities and privateers as pirates, and finally say a few words about the remedy against pirates.

PIRACY: DEFINITION OF.

§287. Pirates are individuals who throw off all restraint of the state to which they belong, and set out as an organized body on the high seas to maintain themselves by their own inherent force. They therefore constitute a state without territory. They are in this category because they operate on the high sea, where there is no jurisdiction of any state, and therefore differ from a similar body on land, who, although they may wish to throw off the restraint of the state within which they are, cannot do so until they destroy the government of that state. The pirates, however, venture upon a portion of the earth's surface which is not subject to any jurisdiction, and where any body of men may set up their own government without displacing any existing government, and maintain it as long as they are able to do so. A number of definitions of piracy are collected in the note,¹⁷ most of which incorporate the idea of acts of violence

¹⁷ "Piracy consists of an act or acts of violation adequate in degree and committed with piratical intent on the open sea by a private vessel without authority from any State or belligerent community;" Hershey, *Int. L.*, (1912) 223. "Pirates, according to Bynkershoek, are persons who depredate by sea or land without authority from a

sovereign;" Hall, *Int. Law*, 6 ed. (1909) 252. See 256n. "Piracy is a robbery committed upon the sea and a pirate is a sea thief;" 1 Halleck, *Int. L.*, 4 ed. (1908) 478. "Piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea by a body of men

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or crime, which while they are usually characteristic of piracy, are not essential ingredients. A body of pleasure seekers, without the slightest idea of harming anybody, who should set sail, haul down the flag of the state of which they were formerly members, and hoist a flag of their own, could be seized and taken into a port by the first warship of any independent state they might fall in with, and the vessel condemned without hope of any restitution. They would be pirates. While the punishment meted out to such a body would probably fall short of the severity inflicted on a band of ruffians, the difference would not lie in the international aspect of the offense but in the degree of the moral turpitude.

Since, however, the object of pirates is contrary to the interests of all other states, it is universally agreed that they may be seized by the ships of any state, and as they are not members of any state themselves no other state can complain of their seizure. The suppression of piracy is simply a high-handed and forcible extinction of a state, distinguished in no other way from the forcible extinction of any other state except that the dangerous character of the state suppressed justifies the means and accordingly obtains the consent

acting independently of any politically organized society;" Hall, Int. Law, 6 ed. (1909) 257. "Any armed violence at sea which is not a lawful act of war;" Lawrence, Int. Law, 5 ed. (1913) 232, quoting Kenny, Criminal Law, 316. "The characteristic elements of the crime of piracy are—(1) a violation, actual or attempted, of the general rights by sea of all States, whether in respect of persons or things; and (2) an absence of allegiance to any one State, or an intention, actual or presumed, to establish an organization subsisting by general rapine;" Manning, Int. L., 2 ed. Amos. (1875) 121. "Piracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder;" 1 Oppenheim, Int. L., 2 ed. (1912) 340. "Piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the

robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury;" 1 Phillimore, Int. L., 3 ed. (1879-1888) 488. "Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from or at the time pertaining to, any established state;" Woolsey, Int. L., 6 ed. (1897) 233. "Piracy is defined by the text writers to be the offence of depredating on the seas without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other;" Wheaton, Elements, Dana's ed. (1866) 192. "A pirate is a rover and a robber upon the sea, and an enemy of the human race. The marine ordinance of Louis XIV. defines pirates to be sea rovers, who have no commission from any sovereign prince;" 1 Wildman, Int. L., (1849) 201.

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of all other states.¹⁸ The essence of piracy is that it is an act committed outside the jurisdiction of any state. When an act is committed within the jurisdiction, as on a ship, public or private, as an assault on one passenger by another, or robbery, then the case is one to be dealt with by the municipal law. When a number of men band together and throw off the authority of the state on the high sea, they become outside the jurisdiction of any state, and in fact, for the time being, so long as they maintain themselves, are independent. It makes no difference how small the body and how powerful the state; a few subjects of a mighty empire like Great Britain might start out as pirates and until they were caught and exterminated would in fact be an independent state.¹⁹ Piracy is not necessarily confined to the high sea since it depends upon a body of men setting up a jurisdiction for themselves. The pirates may therefore land on an island and still be pirates if the land is no state territory. If they come within the jurisdiction of another state, then their independent status ceases to exist. Their conduct is subject to the political power of that state, and while punishable as pirates for acts committed before entering the jurisdiction, they are subject to the municipal law of the state. There is no remedy in such case except upon the pirates themselves. A few instances of piracy are collected in the note.²⁰ The question whether the slave trade is

¹⁸ See as to piracy Bynkershoek, *Law of War*, (1737) Du Ponceau Trans. 127 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 476-482; 2 Moore, *Dig. of Int. L.*, (1906) 151 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 340 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 488 et seq.; Walker, *Science, Int. L.*, (1893) 164 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 181 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 192 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 233 et seq. "Piracy and the Barbary Corsairs;" J. E. G. de Montmorency; 35 *L. Q. Rev.* 133-142.

¹⁹ The armies of mercenaries who ravaged Europe during the middle ages were practically pirates on land because they recognized the jurisdiction of no state and were, for the time being, independent political organizations. For an account of, see Manning, *Int. L.*, 2 ed. Amos. (1875) 227.

²⁰ 1873—An insurrection broke out in the southeast of Spain, and the Spanish squadron stationed at Cartagena fell into the hands of the insurgents. The crews of these vessels were proclaimed pirates by the Spanish Government, and it became necessary for states having vessels of war in the West Mediterranean to decide on the line of conduct. French and German naval commanders were ordered to allow freedom of action to the insurgent vessels so long as the lives or the property of subjects of the respective states were not threatened. Great Britain gave similar orders, including, however, interference to Italian as well as English persons or property. This was a political piracy and no criminal jurisdiction was assumed over it except in the case of damage to members of another power; Hall, *Int. Law*, 6 ed.

piracy by international law has been extensively discussed. If the slaver sails under his own flag he is a pirate, and the fact that he is capturing slaves is immaterial. If, however, he sails under the flag of any state, he is not a pirate even though engaged in this nefarious business. It seems as if the discussion of the writers was somewhat remote from the real point involved.¹

(1909) 260. 1877—Revolution in Peru. Peruvian warship "Huascar," lying in harbor of Calloa, seized by the crew and some of her officers and proceeded to sea, took a supply of coal from British ships without payment, stopped another British steamer, taking two Peruvian officers therefrom by force. The Peru Government, however, in the meantime stated that it would not be responsible for the acts of the insurgents. Accordingly, the admiral in command of the English squadron of the Pacific, regarding the warship as a pirate, attacked her and fought an action from which she escaped and subsequently surrendered to a Peruvian squadron. Peru complained loudly. The conduct of the British officers was approved and the matter allowed to drop by Peru. Great Britain refused to make any payment; 1 Cobbett Cases, 3 ed. (1909) 287; Hall, *Int. Law*, 6 ed. (1909) 261; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 342; *Hershey, *Int. L.*, (1912) 225, n; Walker, *Man. Int. L.*, (1895) 56. A number of negroes were kidnapped in Africa and transported on a Spanish ship in violation of the laws of Spain relating to the slave trade. The negroes arose on the captain, killed him and the cook, took possession of the ship, which was seized in territorial waters by United States brig. On libel for salvage by the commander of the brig, the ship and cargo were restored to the Spanish owners subject to allowance for salvage, and the negroes were set free as they were not pirates, having been kidnapped from Africa, and, by the laws of Spain, entitled to their free-

dom. The claim of the minister to Spain for the restoration of the ship and cargo under treaty with Spain rejected, as case did not come within the clause of the treaty; *United States v. Amistad*, 15 Peters, 518 (1841). See *United States v. Smith*, 5 Wheat. 153 (1820); 1 Cobbett Cases, 3 ed. (1909) 283 et seq. 1877—Spanish steamer "Montezuma" was seized by Cuban insurgents and sailed by them under the name of the "Sespedes" to attack Spanish merchantmen in the Rio de la Plata. The Governor of Brazil refused to accede to the request of the Spanish Government to treat them as pirates if they should enter Brazilian ports; Hershey, *Int. L.*, (1912) 225, n.; 1 Westlake, *Int. L.*, 2 ed. (1910) 184. In "The Magellan Pirates," Dr. Lushington held that certain Chilean insurgents who had seized a British and an American vessel and appropriated treasure found on board one of these vessels, were pirates, but it was not on the ground that they were insurgents. The learned judge said: "It does not follow that rebels and insurgents may not commit piratical acts against subjects of other States, especially if such acts were in no degree connected with the insurrection or rebellion." See 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 360, for a further report of this case; Hershey, *Int. L.*, (1912) 224, n.³⁰. See Walker, *Science, Int. L.*, (1893) 164, 165 for other cases.

¹ See Hall, *Int. Law*, 6 ed. (1909) 263; Lawrence, *Int. Law*, 5 ed. (1913) 237-242; Wheaton, *Elements*, Dana's ed. (1866) 201; Woolsey, *Int. L.*, 6 ed. (1897) 236-238.

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DISTINCTION BETWEEN PIRACY BY INTERNATIONAL LAW AND PIRACY BY MUNICIPAL LAW.

§288. A state may by municipal law designate any act within its jurisdiction as piracy,³ but calling the crime such does not make it piracy according to international law. A so-called pirate within the jurisdiction is not a pirate in fact because he cannot escape from the superior political jurisdiction of the state in which he is, and therefore whatever he does is criminal, according to the law of that state to which he is in fact subject. If he is a pirate on the high sea, he is not subject to the superior political power of any state and therefore within the scope of international remedies. Municipal law in short cannot make any act piracy that is not such in fact.⁴

BELLIGERENTS AS PIRATES.

§289. The question whether the ships of a belligerent state shall be regarded as pirates depends on whether the belligerency of the state is recognized. One of the effects of that recognition is, as we shall point out,⁴ that the warships of the belligerent community are entitled to exercise international violence, and are considered as being under the lawful commission of an independent state. Whenever an independent state recognizes the belligerency of any community, it in effect engages not to treat the warships of that community as pirates. If, therefore, in any case the belligerency of a state is recognized only by some states and not by others, the result will follow that the ships of that belligerent community may be treated as pirates by one state and not by the other. There is a further distinction that warships of a belligerent community are more or less disciplined and conducting a political warfare against the superior power which they are fighting, and ordinarily do not sail the high seas with the object of murder and private plunder. The question of recognition of belligerency may well be made to depend upon the discipline and proper exercise by the belligerent ships of the privilege of international violence.⁵

³ Hall, *Int. Law*, 6 ed. (1909) 263.

⁴ Woolsey, *Int. L.*, 6 ed. (1897) 235. As to distinction between piracy by international law and by municipal law, see Walker, *Man. Int. L.*, (1895) 55; Wheaton, *Elements*, Dana's ed. (1866) 194; Woolsey, *Int. L.*, 6 ed. (1897) 234, 235. As to meaning of

piracy in extradition treaties, see Wheaton, *Elements*, Dana's ed. (1866) 184.

⁴ See §608, post.

⁵ For discussion, see Hall, *Int. Law*, 6 ed. (1909) 254 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 476 et seq.; Hershey, *Int. L.*, (1912) 224n; 2 Moore, *Dig. of*

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PRIVATEERS AS PIRATES.

§290. Privateering was, as will be pointed out, common in the middle⁶ ages, and it is only in the last hundred years that it has been suppressed. There was no question whatever of treating privateers as pirates until the opening of the nineteenth century. Now, however, the attitude of the independent states of the world against privateering is such that in many wars it has been announced that privateers will be treated as pirates, and that threat has very largely deterred the commissioning of these instrumentalities of war.⁷

REMEDY AGAINST PIRATES.

§291. The remedy against a pirate is by act of state, seizing him on the high sea and taking him into port for punishment.⁸ In many cases the so-called pirate is within the jurisdiction of the state and cannot be said to have set up an independent state jurisdiction of his own. The remedy, therefore, in that case is by municipal law. The exercise of the power of the state in each case is somewhat similar and has undoubtedly contributed to the confusion which exists between piracy by international law and piracy by municipal law. We may distinguish by saying that when the seizure is outside the maritime belt, it is a case of the exercise of the international remedy, and when the seizure is within the belt, it is an exercise of the municipal remedy. Since, therefore, each independent state may exercise its power of seizing pirates at sea without restraint by any international factor of conduct, it follows that there will sometimes be a difficulty in determining in fact whether a ship is a pirate. It is commonly said that the warships of every state may exercise visit and search⁹ in case of bona fide suspicion of piracy, which is sustained

Int. L., (1906) 1076-1123; 1 Oppenheim, Int. L., 2 ed. (1912) 342 et seq.; 1 Westlake, Int. L., 2 ed. (1910) 183; Wheaton, Elements, Dana's ed. (1866) 196, n.; Woolsey, Int. L., 6 ed. (1897) 235-236.

⁶ See §748, post, on privateers.

⁷ Hall, Int. Law, 6 ed. (1909) 258 et seq.; 1 Halleck, Int. L., 4 ed. (1908) 85, n.2; 1 Oppenheim, Int. L., 2 ed. (1912) 341; 1 Phillimore, Int. L., 3 ed. (1879-1888) 502. Where, however, the privateer takes a commission from two

states at war with each other, the act is regarded as piratical since the authority conferred by one is repugnant to the other; 2 Halleck, Int. L., 4 ed. (1908) 140; 1 Phillimore, Int. L., 3 ed. (1879-1888) 502; Wheaton, Elements, Dana's ed. (1866) 192; Woolsey, Int. L., 6 ed. (1897) 234.

⁸ As to remedy see 1 Oppenheim, Int. L., 2 ed. (1912) 340-348; Woolsey, Int. L., 6 ed. (1897) 234.

⁹ See §295, post.

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on the ground that pirates are enemies of all states and all must therefore concur in the remedy of suppression. This is undoubtedly a correct statement, but if it sometimes happens that under suspicion of piracy a bona fide ship of the state is visited, searched or seized, there is a question of a conflict of state jurisdiction on the high sea.

Interference Between Ships on the Open Sea.

PRELIMINARY.

§292. The navigation of the open sea by various ships will inevitably lead to interference between them.¹¹ When ships of the same state are concerned, the resulting controversy is entirely a matter of municipal law. As between ships of a different state, we may distinguish private ships and public ships, which will be discussed in the order named.

INTERFERENCE BETWEEN PRIVATE SHIPS.

§293. Interference between private vessels will generally be by way of collision and may be accidental or with the intention of inflicting damage. The act of damage is that of a private person, has no state significance, and, if done between ships of same state, will be adjudicated by the municipal law. Between ships of different states, the general custom has been for the admiralty courts of all maritime states to take jurisdiction irrespective of the state membership of the vessels concerned.¹² The jurisdiction of the court of admiralty is *in rem*, and it is a matter of great convenience to ships and a consequent advantage to trade if a libel can be filed against the ship in any port where she may be found. This jurisdiction is very old and has grown up without opposition from an international

¹¹ Interference between ships on the open sea:

Preliminary..... §292

Private vessels..... §293

Public vessels:

Preliminary..... §294

Acts of interference:

Preliminary analysis of... §295

In time of peace:

Preliminary..... §296

Policing the high sea... §297

Self preservation..... §298

Black slave trade..... §299

¹² 2 Moore, Dig. of Int. L., (1906) 79; Twiss, L. of Nations, Peace, 2 ed. (1884) 286 et seq.; 1 Westlake, Int. L., 2 ed. (1910) 179. There is, however, some difference in the jurisdiction assumed by the various states; see 1 Oppenheim, Int. L., 2 ed. (1912) 332 et seq., where he refers to the efforts which have been made to establish uniform regulations as to collisions at sea. See Resolutions of the Institute of International Law, at meeting of 1888, Carnegie Ed., 83.

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point of view. It is perhaps in some respects a branch of private international law and what some writers call the common law of the sea. The topic is a branch of the law by itself and is only referred to in passing for the sake of completeness and indicating its place in our discussion.

Interference by Public Ships.

PRELIMINARY.

§294. Interference by a public ship is an act of state unless disavowed by the state in question, and may or may not result in damage. There is no question whatever of the complete power of the state to overwhelm on the high sea any inferior force of ships of another state, whether public or private. The only question is how far the exercise of that power is restrained by international factors of conduct.¹³ We shall first analyze the act of interference.

The Acts of Interference.

PRELIMINARY—ANALYSIS OF.

§295. The acts of interference by a public ship with a public or private ship may be classified as follows: (A) the verification of the character of a ship by signal or outward inspection without detaining the ship or altering its course; (B) the verification of the character of the ship by stopping her and sending someone on board to examine the papers or requiring the captain to bring the papers to the examining ship; (C) the search of the ship to ascertain what is on board; (D) seizure of all or part of the cargo or individuals on the ship and then allowing the ship to go on its course; (E) capture of the ship; (F) destruction of the ship not accompanied by destruction of individuals on board; (G) destruction of the ship and individuals on board. These acts are purposely arranged in the order of intensity of damage inflicted by the act of interference, and may be divided into two classes—(A), (B) and (C), interferences without special damage other than that caused by delay; (D), (E), (F) and (G) interference causing serious damage and therefore of grave concern. Interference by public ships on the high seas will be (A) in time of war, when the interference is part of the conduct of hostilities—the exercise of

¹³ For definition of, see §105, ante.

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international violence,¹⁴ (B) in time of peace, which stands on a different footing and to which our attention will now be confined.

The term "visit and search" in international law is somewhat ambiguous and different meanings have been given to the phrase.¹⁵ Visit, of course, means to go to and enter into, and search means an examination of the interior. The contention in the first place turns on whether the phrase means a verification of the character of the ship or whether it includes the act of going on board and searching the vessel. This contention is further complicated, as frequently happens, by the contention over whether, and to what extent, a public ship may interfere with a private ship of another state on the high sea in time of peace. The principal controversy over the question of visit and search in time of peace arose over the practice of great maritime powers of impressing seamen from the ships of other powers on the high seas. In such cases the ships of other powers were stopped, searched and seamen supposed to be deserters taken off.¹⁶ This practice is now obsolete.

Interference in Time of Peace.

PRELIMINARY.

§296. We start with the proposition, which is sufficiently apparent from the discussion of the jurisdiction of independent states in the open sea, that no state can interfere with the ship of any other state navigating the high seas without invading the jurisdiction of that state. The converse is also true, that where a ship belonging to no state is navigating the seas, it may be dealt with by a ship of another state as the latter pleases, and there is no independent power in the

¹⁴ See §603, post.

¹⁵ See 2 Halleck, *Int. L.*, 4 ed. (1908) 272 et seq.; 2 Moore, *Dig. of Int. L.*, (1906) 903 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 337-338; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 522 et seq.; Twiss, *War*, 2 ed., (1875) 176; Woolsey, *Int. L.*, 6 ed. (1897) 357 et seq.

¹⁶ Great Britain frequently exercised this power against the ships, public and private, of the United States of America, and her insistence upon this practice was the principal cause of the War of 1812 between the two countries.

The matter has been fully discussed by the writers and needs no further detailed reference here. It is sufficient to say that since that war the claim of impressing seamen has disappeared, and never been heard of since; 2 Halleck, *Int. L.*, 4 ed. (1908) 302-304; Lawrence, *Int. Law*, 5 ed. (1913) 229, 230; 2 Moore, *Dig. of Int. L.*, (1906) 987-1001; Wheaton, *Elements*, Dana's ed. (1866) 171-175. "Visitation and Search," (1858) William B. Lawrence. Historical account of British claim to impressment.

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world to complain because that ship is not a member of any such power. There are a number of instances of such interference in time of peace, which are permitted by the international factors of conduct. They are (A) policing the high seas, (B) piracy, (C) slave trade. Except in these cases the act of interference is usually adjusted between the states concerned.¹⁷

INTERFERENCE IN POLICING THE SEA.

§297. Since navigation in the open sea may be engaged in only by the members of a state, and since ships of no state may be attacked by any state, it follows that the fact whether in any given case an attack upon a ship will be resented by an independent power depends on whether in fact the ship so attacked was a member of this state or not. Since ships carry certain documents showing their character,¹⁸ it is obviously a matter of common sense and practical convenience for the warships of any state to examine the documents, when occasion requires, and see if the ship in question has a title to navigate the sea. The validity of any seizure, therefore, of a ship on the high sea depends on a question of fact to be learned only by an examination of the ship in question. This is probably the most delicate question of fact arising in international relations. The very act of examination implies a suspicion which is naturally resented by the state of which the ship is a member. Independent states are very jealous of the flag,¹ the dignity and the jurisdiction of the state, and are particularly sensitive to any reflection upon state honor or integrity. A respectable member of a community would feel just as much outraged if a policeman should stop him on the street, accuse him of being a thief and refuse to release him until he could prove by neighbors his identity and good character. In practice in municipal life, with an absence of malice on the part of police officers, acts of this kind will rarely occur. In modern times piracy has practically disappeared. Furthermore, the ships of every state are registered and known. The registries are printed and accessible in foreign countries. The consequence is that ships meeting each other on the seas are generally able to recognize one another's identity merely on passing and by use of international code of signals. The case in practice, therefore, when it would be necessary to stop any

¹⁷ See §505, post, as to adjustment of state conflict. §283, ante.

¹ Abuse of flag, see 1 Oppenheim, Int.

¹⁸ As to identification of a ship, see L., 2 ed. (1912) 336.

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ship on the high sea on the suspicion of being there illegally, will be extremely rare, in fact it is believed no such case has occurred since the year 1850,² except perhaps a few insignificant piratical expeditions in the East. A body of pirates may be so openly recognizable as such that the fact is apparent and an attack will follow. In such a case there is no cause to complain. The only difficulty is where a search is made by mistake on suspicion of piracy of a ship really belonging to another state. The remedy here is apology and indemnity to the private persons, if any, damaged by the act of stoppage. The principle seems to be that every state exercises the right of visit and search in time of peace at its peril and is liable for any mistake and cannot escape on any ground of error in judgment or discretion. The uniform practice is to make prompt apology where such mistakes have occurred.

² 1812, Aug. 31—A court martial was held in the Downs, on the Hon. Henry Blackwood, commander of His Majesty's ship "Warspite," upon a charge of having caused the death of a master of a merchant schooner in the Mediterranean, by ordering several guns to be fired into her. The merchant vessel had not obeyed the usual means taken to bring her to, but persisted in her course and made more sail. Captain Blackwood, considering it imperious on him to ascertain that she was not a privateer (for he knew that several were near), went in chase and fired at her, when, unfortunately, the master was killed. The mate of the schooner represented the circumstances to the Admiralty, and the court martial was accordingly held. No person belonging to the schooner appeared to substantiate the charge of murder, although they had received notice of the trial. The court martial not only acquitted Captain Blackwood, but adjudged his conduct to have been strictly correct, and that he could not have acted otherwise; *Ann. Reg.* 1812, 110, 111. The "Marianna Flora," 11 *Wheaton* 1, (1826); 1 *Cobbett Cases*, 3 ed. (1909) 264 et seq. 1838—The British packet "Express" on her way from Vera

Cruz to Sacrificios, was stopped by a French ship of war, and her pilot taken on board the French ship. The French Government apologized for the occurrence, stating that the officer who had given the order was not aware that the packet was an English vessel. (*Parl. Papers* of 1839). 1855—The "El Dorado," a United States mail vessel, was stopped upon the high seas by a Spanish frigate, and was boarded by a Spanish officer and required to produce papers. It appeared that the cruiser was only ordered to visit or search foreign vessels when within the maritime jurisdiction of Spain. The apology was considered to be "technically satisfactory" by the United States Government; 2 *Halleck, Int. L.*, 4 ed. (1908) 273n. 1831—The brig "Ann," an American ship of Boston, on a voyage from New Orleans to Madeira, was captured by a part of the Portuguese squadron and was, with her cargo, condemned by a Portuguese court at Lisbon. Upon the remonstrance of the United States, the claim of the owner for compensation was, on the 19th of January, 1832, admitted by Portugal, and part of the amount soon afterwards paid. See *Allen v. Hammond*, 11 *Peters*, 63 (1837).

INTERFERENCE FOR SELF-PRESERVATION.

§298. There are two cases where a public ship of a state will interfere with the public or private ships of another state for the purpose of self-preservation: (A) in time of war; (B) in time of peace. In time of war, the conflict is between public ships of the enemy, and neutrals will be interfered with to a certain extent, and the discussion of this case is relegated to a subsequent part of the treatise.³ An interference between public ships in time of peace will lead to war, unless the matter is adjusted. Such cases are extremely rare, and when they do occur, are matters of accident or disregard of order by subordinate officers, which are disposed of by apology and such other amends as the case calls for. The discussion, then, is narrowed to the case of interference by a public ship with a private ship of another state on the ground that the private ship is engaged in an enterprise hostile to the government of the seizing state, and there seems to be no contention but that in such case the seizure is proper. The private vessel is not engaged in a state act and is beyond the restraint of its own state. The question then is whether an individual can use the flag of his own state as a cloak to cover an expedition hostile to another state. The two principal instances which have occurred have been those of filibustering expeditions in aid of insurgents.⁴

³ See §955 et seq., post.

⁴ 1857, June—The "Cagliari," a Sardinian passenger steamer, was seized, when on her voyage from Genoa to Tunis, by some of her passengers, who assumed control of the vessel and made for the Isle of Ponza, where they broke into the Neapolitan state prison and released some hundreds of prisoners, by whose assistance they compelled the officers of the "Cagliari" to land them at Sapri, where they commenced a revolutionary movement which was speedily overcome by the Neapolitan troops. The captain of the "Cagliari" after landing the revolutionists, steered for Naples to report, but when some distance off Capri she was captured by Neapolitan cruisers and taken into Naples, where her crew, amongst whom were two English engineers, were imprisoned. The Sardinian Government

contending that the assistance to the Neapolitan rebels by the captain and crew of the "Cagliari" was forced upon them against their will, demanded the restitution of the vessel and liberation of her crew. The Neapolitan Government refused to restore. The British Government, however, supported Sardinia; Naples yielded, and the British engineers were granted cash compensation for their sufferings, and the "Cagliari" and her crew given up to the British consul and by him conveyed to Genoa. The claims of Sardinia were ignored and the Neapolitan prize court subsequently decided that the capture of the "Cagliari" on the high seas was valid because she had been engaged in acts of combined hostility and piracy. This case differs from the "Virginus" because when the ship was seized she had ceased to participate in any unlaw-

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If the expedition has escaped the jurisdiction of its own state, proceeded upon the open sea, and then discovered its true purpose, there seems to be no reason why the state concerned should not interfere before it reaches its destination. The interfering state acts at its peril, just as in the case of a seizure on ground of piracy, and if it turns out that there was no ground for the seizure, there is a plain case of invasion of the jurisdiction of another state, which calls for adjustment.

INTERFERENCE IN BLACK SLAVE TRADE.

§299. Since every state has exclusive jurisdiction over its own ships on the high sea, it follows that no other state may inquire into or take cognizance of the fact that any person is held as a slave on board such a vessel. The only power which may act in the matter is the independent state whose member is so confined.⁵ Black slaves

ful proceeding against the government of Naples, and it seems as if the action of the Sardinian government was not to be sustained on any ground at all; Walker, *Man. Int. L.*, (1895) 88. 1873—Cuban insurrection against Spain. The "Virginius," owned by insurrectionists and flying the American flag, was seized by Spain. The persons on board, Americans, Englishmen and Cubans, were condemned and executed as pirates. Seizure of vessel was regarded as justifiable, execution unjustifiable, as charge of piracy was groundless. Compensation paid Great Britain and United States of America. Said in 1 Oppenheim, *Int. L.*, 2 ed. (1912) 187n², not to be a case of necessity; 1 Cobbett Cases, 3 ed. (1909) 165 et seq.; Hall, *Int. Law*, 6 ed. (1909) 270; 2 Moore, *Dig. of Int. L.*, (1906) 895-903, 967, 968; Walker, *Man. Int. L.*, (1895) 91. In this case it seems clear that Spain without doubt had power to seize the filibusterers immediately upon their entry within Cuban waters. Furthermore, that if there was any rule of international law forbidding the members of one state to go forth from the jurisdiction armed for the purpose

of fomenting insurrection with another, then there was an obligation on the United States to keep the filibusterers within its jurisdiction, which obligation having been by inadvertence or otherwise, not fulfilled, and the filibusterers having slipped through, there was then a case of their being at large on the high seas and very much in the predicament of being liable to be seized. So far as the fact that the ship flew the United States flag is concerned, it seems clear that the Spanish vessel acted at its peril in making a seizure. If it should turn out, as in fact it did turn out, that it was a Spanish vessel, then there was no question involving the United States. Under the heading of "Self-defense on sea in time of peace," Westlake discusses the case of the "Virginius" and the seizure by the United States vessels of British fur sealers outside the three miles limit in Behring Sea, and the cases of fraudulent registration of vessels. The discussion is obscure; 1 Westlake, *Int. L.*, 2 ed. (1910) 171.

⁵ See "The Fortuna," 1 Dods. Rep. 81 (1811); "The Donna Marianna," 1 Dods. Rep. 91 (1812); "The Diana,"

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were taken on the African coast by force or bought from native tribes, which were internationally helpless and unable to protect their members. Therefore, the slave trade as such was entirely outside the purview of international law; in other words, there was no method by which slavers could be exterminated unless by agreement⁶ between the maritime powers of the world whose members were engaged in the slave trade.⁷ It therefore became necessary to bring about some agreement by the various maritime powers because regulations operating to restrain such traffic involved an invasion of the jurisdiction of each of such powers to which the regulations were made to apply. Great Britain took the lead in the negotiation of treaties under the provisions of which the war vessels of the contracting parties were authorized to hunt down slavers and, for the accomplishment of that end, to exercise the right of visit and search over merchant ships of the various states. This movement has been almost entirely successful, and now the black slave trade has almost disappeared from the world except on the west coast of Africa.⁸

FISHERIES IN THE OPEN SEA.

§300. Fisheries in the open sea are not the subject of the jurisdiction of any state.⁹ Each state, however, has an interest in them. The interest, therefore, is common and no state may exclude another from any such fishing. This common interest has resulted in many fisheries being regulated by treaty in the interests of all, under the

1 Dods. Rep. 95 (1813); "Le Louis,"

2 Dods. 210 (1817), 1 Cobbett Cases, 3 ed. (1909) 290 et seq.; "The Amedie,"

1 Acton Rep. 240 (1810); "The Antelope," 10 Wheat. 66 (1825). See 10

Wheaton, Appendix, for discussion of the above cases and collection of documents relating to the slave trade.

⁶ In this respect differing from piracy, which was an offence punishable without any agreement between the states concerned.

⁷ There is a difference of opinion as to whether engaging in the slave trade can be treated by law of nations as piracy. Manning, Int. L., 2 ed. Amos. (1875) 121, says no, because not piracy in fact but may be made subject to same penalties. See Wheaton, Elements,

Dana's ed. (1866) 201; Woolsey, Int. L., 6 ed. (1897) 236 et seq.; Resolutions of the Institute of International Law, at meeting of 1891, Carnegie Ed., 93.

⁸ Hershey, Int. L., (1912) 226-230; 1 Halleck, Int. L., 4 ed. (1908) 263-270; 2 Moore, Dig. of Int. L., (1906) 914-951; 1 Phillimore, Int. L., 3 ed. (1879-1888) 402 et seq.; Wheaton, Elements, Dana's ed. (1866) 197; Woolsey, Int. L., 6 ed. (1897) 237, 370 et seq. See Resolutions of the Institute of International Law, at meeting of 1891, Carnegie Ed., 93, and Resolutions of the Institute of International Law, at meeting of 1894, Carnegie Ed., 111.

⁹ 1 Oppenheim, Int. L., 2 ed. (1912) 348-353.

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Islands, Subsoil, Aerial Space

provisions of which the members of the contracting states are subject to certain regulations in using the fisheries.¹⁰

ISLANDS IN THE SEA.

§301. Islands are frequently found in the sea and if they are near enough to the mainland they are in the same ownership as the land to which they are adjacent. If distant, they are subject to discovery and occupation, just as other portions of the earth's surface.¹¹ Few cases have arisen as to islands, as most of them have been occupied and settled by particular states.¹²

THE SUBSOIL OF THE OPEN SEA AND AERIAL SPACE ABOVE.

§302. The subsoil of the sea has been used for submarine cables and the aerial space above for wireless telegraphy and flying. In

¹⁰ The following fisheries have been subject to regulation by treaty: (a) Fisheries in the North Sea. See 1 Oppenheim, *Int. L.*, 2 ed. (1912) 265, n.³ (b) Seal fisheries in the Behring Sea. See 1 Halleck, *Int. L.*, 4 ed. (1908) 177; 1 Moore, *Dig. of Int. L.*, (1906) 890-929; Walker, *Science, Int. L.*, (1893) 175-204; Wilson & Tucker, *Int. L.*, (1901) 116. (c) Seal fisheries around the Falkland Islands and Iceland. See 1 Moore, *Dig. of Int. L.*, (1906) 876-890. As to claim of Great Britain to control herring fishing to within ten miles of her shore, see Martens, G., *Law of Nations*, (1788) Cobbett's *Trans.* IV. IV. 14n. Moray Firth, Fisheries in, see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 264. (d) Northeastern fisheries on the banks of Newfoundland, for controversy over which, see 1 Cobbett Cases, 3 ed. (1909) 153 et seq.; 1 Moore, *Dig. of Int. L.*, (1906) 767-876. For discussion and extracts from some of the treaties, see 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 270 et seq. As between Great Britain and France regulated by Treaties of Utrecht (1713), Paris (1763), Versailles (1783), Paris (1814), Paris (1885). 1783—By treaty, United

States had right of fishing on certain parts of coast of British Dominions of North America. Claims adjusted by Treaty of 1818, disputes under which were settled by Treaty of 1854, which was terminated by the United States in 1866. 1871—The Treaty of Washington practically re-established the provisions of the Treaty of 1854. By the termination of the provisions of the Treaty of 1871, the provisions of the Treaty of 1818 again came into force; Wilson & Tucker, *Int. L.*, (1901) 115. "The North Atlantic Coast Fisheries Arbitration," Robert Lansing; 5 *Amer. J. Int. Law*, 1 et seq. "The Final Outcome of the Fisheries Arbitration," Chandler P. Anderson; 7 *Amer. J. Int. Law*, 1 et seq. "A History of the New England Fisheries," with maps, (1911) Raymond McFarland. See 5 *Amer. J. Int. Law*, 865. See §329, post, on fisheries in maritime belt.

¹¹ 1 Westlake, *Int. L.*, 2 ed. (1910) 118 et seq.

¹² For a discussion of the Guano Islands and the acts of Congress relating thereto, see 1 Moore, *Dig. of Int. L.*, (1906) 556; Wheaton, *Elements*, Dana's ed. (1866) 255 et seq.

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the instance of submarine cables, no question of any conflict has arisen, as the number of these cables is few and the sea in ample extent for them all. Wireless telegraphy and flying are as yet in their infancy and no precedents have arisen. This part of the discussion will have to be left for future development.¹³

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PRELIMINARY.

§303. There are portions of the open sea almost entirely surrounded by land as to which there is some question of the maritime jurisdiction of a littoral state. The water here is almost entirely surrounded by the territory of a state, and therefore nearly analogous to the case of a lake or river entirely within the state. Since, however, the body of water is connected with the open sea, there is a species of navigable use which may be made by ships traversing the open sea, and the question is whether the aspect of the maritime belt disappears in that of the body of water as entirely surrounded by land. The question as to the jurisdiction of a state over a branch of the open sea is complicated by the conflict between the extension of the freedom of the sea to the branches and the presence of the maritime jurisdiction of the state within whose territory the branch is. As may be expected, the force of the claim to the maritime belt increases with the decrease in size of the branch of the open sea in question. We shall discuss (A) small seas; (B) gulfs and bays; (C) straits.

SMALL SEAS.

§304. There are a great many small seas situate in various parts of the earth's surface which are branches of the open sea, and as to some of which a question has arisen as to the jurisdiction of the littoral state therein.¹⁴ It is sometimes difficult in fact to distinguish a small sea from a gulf or bay. The principle, however, seems to be

¹³ See 1 Oppenheim, *Int. L.*, 2 ed. Whewell's *Trans.* II. III. VIII. IX. (1912) 353-357. Submarine cables. Hershey, *Int. L.*, (1912) 203, calls them "international lakes and seas." They are lakes and seas first, and the question whether they are international

¹⁴ Grotius, *Belii. ac. Pacis* (1625), depends on extraneous facts.

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Gulfs, Bays

the same and to depend very largely on the size of the sea. A few cases are referred to in the note.¹⁵

GULFS AND BAYS.

§305. Where the mouth of the gulf and bay is less than six miles wide where it connects with the open sea, it is clear that the two maritime belts, one on each side of the mouth, unite and cover the entire mouth, and therefore the state may control the mouth of such a body of water, which gives it control over the interior.¹⁶ Since, however, the jurisdiction of the maritime belt does not exclude innocent navigation by foreign merchantmen, there is a question whether, in a case like this, there is a jurisdiction to exclude such vessels. Does the fact that the entire mouth is under control of the state, together with the fact that the interior body of water is entirely

¹⁵ *Adriatic*, claimed by Venice; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6. *Baltic Sea*. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 201 et seq., discusses it under the heading of "Straits," and says that the states surrounding the Baltic endeavored to convert it into a closed sea of their own in which outside powers should not be allowed to carry on any operations of war; 1 Halleck, *Int. L.*, 4 ed. (1908) 180; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 253 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 266. *Caspian Sea*, surrounded by Russia and Persia, almost entirely under Russian control by treaties of Gulistan (1813), and Tourkmantschai (1828). See 1 Moore, *Dig. of Int. L.*, (1906) 669; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 246n⁴; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 53. *Black Sea* was formerly entirely Turkish, being surrounded entirely by Turkey. Russia acquired territory on the banks of the same, and it was neutralized by the Treaty of Paris in 1856, which neutralization was abolished by the Treaty of London of 1871. Since 1878, Roumania and Bulgaria have territory on, but free navigation for all merchantmen has

been provided for; Wheaton, *Elements*, Dana's ed. (1866) 263. For extracts from some of the treaties relating to, see 1 Halleck, *Int. L.*, 4 ed. (1908) 180; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 247; 1 Phillimore, *Int. L.*, 2 ed. (1879-1888) 292-303; Wheaton, *Elements*, Dana's ed. (1866) 263. See *Bosphorus and Dardanelles* under heading of straits. *Ligustic Sea* formerly claimed by Genoa; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6.

¹⁶ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 262; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 294. 1839—Fishery Convention between Great Britain and France adopted the rule of ten miles. 1853—Mixed commission between United States and Great Britain for the purpose of settling claims, etc., decided against the claim of Great Britain that the Bay of Fundy was British territorial water, on the ground, among others, that the distance from headland across its opening was greater than ten miles. 1888—United States and Great Britain negotiated a fishery treaty adopting the ten-mile line in the case of bays and harbors, which was not ratified by the Senate; Lawrence, *Int. Law*, 5 ed. (1913) 144, 145.

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surrounded by the state, make the body of water take on the aspect of a land-locked sea, and lose its aspect as a portion of the open sea? Even in cases where the mouth is more than six miles wide, many states have claimed exclusive jurisdiction over the entire body of water within. A few cases are referred to in the note.¹⁷

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PRELIMINARY.

§306. Straits from one branch of the open sea to another are of several kinds: (A) those passing entirely through the territory of a

¹⁷ **Bristol Channel**; 1 Moore, Dig. of Int. L., (1906) 739. **Bothnia**, Gulf of—territory of Sweden; Hall, Int. Law, 6 ed. (1909) 149; Martens, Summary, (1788) Cobbett's Trans. IV. c. IV. §6. **Buzzards Bay**; 1 Moore, Dig. of Int. L., (1906) 742. **Chesapeake Bay**. United States claimed the full ownership of Chesapeake and Delaware Bays; 1 Moore, Dig. of Int. L., (1906) 741; 1 Oppenheim, Int. L., 2 ed. (1912) 263. **Canso**, Gut. of—between Cape Breton Island and mainland of Nova Scotia. **Conception Bay**—Newfoundland; Hall, Int. Law, 6 ed. (1909) 155; 1 Moore, Dig. of Int. L., (1906) 740; 1 Oppenheim, Int. L., 2 ed. (1912) 263. **The Direct U. S. Cable Co. v. Anglo-American Telegraph Co.**, L. R. 2 App. Cases, 394 (1877); 1 Cobbett Cases, 3 ed. (1909) 140 et seq.; **Snow Cases**, (1898) 45. **Delaware Bay**—(1793)—The British ship "Grange" was captured by a French frigate "L'Ambuscade" in the Delaware Bay, and brought into the port of Philadelphia, to which she was bound. The demand of the British Government for her release was complied with by the United States, notwithstanding the contention of France that the Bay of Delaware was part of the open sea; 1 Moore, Dig. of Int. L., (1906) 735; 1 Oppenheim, Int. L., 2 ed. (1912) 263. **Great**

Britain—King's Chambers: Great Britain claimed "king's chambers," which are all waters within lines drawn from headland to headland; Hall, Int. Law, 6 ed. (1909) 155; 1 Oppenheim, Int. L., 2 ed. (1912) 263, contra; Wheaton, Elements, Dana's ed. (1866) 257. Germany claims the waters within boundaries or incurvatures of the coast which are less than ten sea miles in breadth reckoned from extreme points of land, and doubtless includes all the water within three miles outward from the land joining such headlands. **Frische Haff**, **Kurische Haff** and **Bay of Stettin** in Baltic, are German; 1 Oppenheim, Int. L., 2 ed. (1912) 263. **Hudson Bay**—"Is Hudson Bay a Closed or an Open Sea?" Thomas Willing Balch; 6 Amer. J. Int. Law, 409 et seq. "The Hudsonian Sea is a Great Open Sea," Thomas Willing Balch; 7 Amer. J. Int. Law, 546 et seq. **Moray Firth**, as to see; 1 Oppenheim, Int. L., 2 ed. (1912) 264; 1 Westlake, Int. L., 2 ed. (1910) 203. **Nootka Sound**; 1 Phillimore, Int. L., 3 ed. (1879-1888) 251. **Zuyder Zee**, Dutch claim to, as territorial water, is perhaps generally recognized; Hall, Int. Law, 6 ed. (1909) 149; Lawrence, Int. Law, 5 ed. (1913) 145; 1 Oppenheim, Int. L., 2 ed. (1912) 263.

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state; (B) those passing between the territory of two or more states; (C) a strait may also connect the open sea or a branch thereof with inland waters, which latter may be either surrounded entirely by the territory of one state or by the territory of several states.¹⁸

STRAIT CONNECTING BRANCHES OF THE OPEN SEA AND PASSING ENTIRELY THROUGH TERRITORY OF ONE STATE.

§307. Where a strait connects branches of the open sea and runs entirely through the territory of one state, it is clear that there is a question of whether the free navigation of the open sea extends through the strait and displaces the jurisdiction which the state would ordinarily exercise over the strait. If the strait is less than six miles wide, then the maritime belt of the two shores meets in the middle, and the strait is part of the marginal waters of the state. Where, however, the strait is more than six miles wide, there is a space between the two outer edges of the maritime belt which may properly be regarded as part of the open sea.¹

STRAITS CONNECTING BRANCHES OF THE OPEN SEA AND PASSING THROUGH THE TERRITORY OF SEVERAL STATES.

§308. This is the same as the one we have just discussed except that here there are different states on different sides of the strait, and consequently, where the strait is narrow, being less than six miles, there will be a conflict in the maritime belt of the two states, and the case will be practically the same as that of an international river, complicated with the question of whether the freedom of the open sea attaches to the navigation of the strait, since it connects two parts thereof. But where the strait is more than six miles wide, then the maritime belts of the two countries do not meet in the middle, and there is a space which seems to be just as much a part of the open sea as any other branch.² In the first case we have put,

¹⁸ Hershey, *Int. L.*, (1912) 201 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 296-300; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 263 et seq.

¹ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 265 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 271; Vattel, (1758) Chitty's Trans. Book I. §292; 1 Westlake, *Int. L.*, 2 ed. (1910) 197 et seq.

² Straits of Fuca between Vancouver Island and territory of the United

States of America are divided throughout into British and American waters, though they vary in width from ten to twenty miles; Lawrence, *Int. Law*, 5 ed. (1913) 144. Lymoon Pass, separating British Island of Hong Kong from the continent, was one-half British and one-half Chinese, so long as land opposite Hong Kong was British territory; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 266.

the conflict is between the jurisdiction of the border state and the freedom of the open sea. In the second case, there can be no conflict because by no possible argument can the jurisdiction of the two littoral states cover the whole strait.

STRAITS CONNECTING BRANCHES OF THE OPEN SEA WITH INLAND WATERS.

§309. Where a strait connects a branch of the open sea with inland water, the case is similar to that of a river in all instances where one state owns all the land around the inland water.³ Where, however, two or more states abut on the inland water, there will be the same conflict we have already noticed. It is perfectly clear, in all these cases, that the states lying inland have an interest in the free use of the straits. A few cases of straits are referred to in the note.⁴

³ 1 Oppenheim, Int. L., 2 ed. (1912) 267.

⁴ **Bosphorus and Dardanelles**, two straits passing through Turkish territory connecting the Black Sea with the Mediterranean. When the Black Sea was surrounded entirely by Turkish territory, the straits were completely under the control of Turkey, under the rule of international law as understood at that time. Russia in the 18th century acquired territory in the Black Sea, and Turkey by several treaties with other states permitted navigation through the straits to foreign merchantmen but always contended that she could exclude foreign men-of-war. This contention was recognized by—(a) the provisions of Art. 116 of the Convention of London of July 10, 1841, between Turkey, Great Britain, Austria, France, Russia and Prussia; (b) Art. 10 of the Treaty of Paris of 1856, and convention No. 1 thereunto annexed, by the further provisions of which treaty light public vessels in the service of diplomatic envoys at Constantinople may be admitted to the straits. (c) Art. 2 of the Treaty of London of 1871, by which latter treaty it is provided

that the Porte may open the straits in time of peace to men-of-war of friendly and allied powers for the purpose, if necessary, of securing the execution of the provisions of the Treaty of Paris. By Treaty of Feb. 25, 1862, between United States and Turkey, the United States is continued on the footing of the most favored nations with regard to passing the Dardanelles and Bosphorus and trading in the Black Sea. States not parties to these treaties have made no objection to the principle of exclusion, but the United States of America, although in practice conforming, seems to consider that it is not bound by the Treaty of London to which it is not a party. The Porte has allowed foreign men-of-war carrying crowned heads to enter the straits, and in 1904, during the Russo-Japanese War, allowed two vessels belonging to the Russian volunteer fleet to pass through, in each case without protest from any other power. In 1902, however, when four Russian torpedo boat destroyers were allowed passage on condition that they should be disarmed and fly the Russian commercial flag, Great Britain protested and declared

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she reserved the right of similar privileges, if necessary. No other power appears to have joined in the protest. Condensed from 1 Oppenheim, *Int. L.*, 2 ed. (1912) 268, 269. See also 1 Halleck, *Int. L.*, 4 ed. (1908) 181n¹; Hershey, *Int. L.*, (1912) 202n¹⁰; Lawrence, *Int. Law*, 5 ed. (1913) 196; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6; 1 Moore, *Dig. of Int. L.*, (1906) 664; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 268, 269; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 308 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 198 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 264, 272; Woolsey, *Int. L.*, 6 ed. (1897) 78. "The Question of the Bosphorus and Dardanelles," (1917) Coleman Phillipson and Noel Buxton. See 13 *Amer. J. Int. Law*, 365. **Danish straits.** Elsinour Sound or the belts dividing Denmark and Sweden and connecting Baltic Sea with Kattegat, as to which Denmark formerly claimed the right to impose Sound dues. See 1 Cobbett Cases, 3 ed. (1909) 147 et seq.; Hall, *Int. Law*, 6 ed. (1909) 149; 1 Halleck, *Int. L.*, 4 ed. (1908) 178; Hershey, *Int. L.*, (1912) 203n¹⁰; Lawrence, *Int. Law*, 5 ed. (1913) 194; 1 Moore, *Dig. of Int. L.*, (1906) 659 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 267; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 254 et seq.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 305, 306; Wheaton, *Elements*, Dana's ed. (1866) 264 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 77. **Gibraltar, Straits of**, connecting the Mediterranean Sea and the Atlantic Ocean; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6. **Great Britain: Narrow Seas**, Bristol Channel, St. George Channel, Irish Sea, North Channel; Hall, *Int. Law*, 6 ed. (1909) 149; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6; 1 Moore, *Dig. of Int. L.*, (1906) 739; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 266; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 264. **Hudson Straits**, connecting Atlantic with Hudson Bay. **Kara Straits**, which connect the Kara Sea with the Barents Sea—Russian; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 266; 1 Westlake, *Int. L.*, 2 ed. (1910) 203. **Magellan, Straits of**, connecting Atlantic and Pacific Oceans; Hershey, *Int. L.*, (1912) 202n¹⁰; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 267n¹. **Solent**, which divides the Isle of Wight from England; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 266. **Sicily, Straits of**, to King of Sicily; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. IV. 6. **Yugor Straits**, connecting the Kara Sea with the Barents Sea—Russian; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 266. Hall, *Int. Law*, 6 ed. (1909) 156, says that there is no distinction between a gulf and a strait, that the fact that other nations need to pass through the strait in going from one branch of the open sea to another is immaterial as the same use may be made of the maritime belt. However, he overlooks the fact that the passing through the strait is absolutely necessary for communication from one branch of the open sea to another, is in the nature of a necessary way, whereas in the case of a marginal belt the various parts of the open sea are accessible without passing through a foreign maritime belt. He says that the circumstance that in one case the body of water ends in the land and in the other, opens into the sea, is immaterial to control, and that there may be greater advantage to a state from a foreign use of a strait than of a maritime belt.

Maritime Belt

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Maritime Belt.

PRELIMINARY—DEFINITION.

§310. The maritime belt is the strip of water where the open sea washes the edge of the land territory of any state, and within which said state exercises certain jurisdiction.⁵ The nature and extent of that jurisdiction are the subject of controversy. The heading of the discussion will appear by the table in the note.⁶

EXTENT OF MARITIME BELT.

§311. There is no common agreement as to the distance from the shore to which this jurisdiction extends or as to the starting point from which to measure. The three-mile or one maritime league limit was suggested in the eighteenth century, as that was then the range of shot fired from cannon at a fixed position on shore. This limit has been generally assented to,⁷ but claims have frequently

⁵ "Maritime belt is that part of the sea which in contradistinction to the open sea, is under the sway of the littoral States;" 1 Oppenheim, Int. L., 2 ed. (1912) 255. He does not indicate what part of the sea it is, and the word "sway" is ambiguous. See as to maritime belt; Vattel, (1758) Chitty's Trans. Book I. §287.

⁶ The maritime belt:

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| Jurisdiction of littoral and foreign states therein: | |
| Preliminary..... | §312 |
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⁷ Treaties between England and United States of 1818, and England and France of August 2, 1839, fixed limits of exclusive fishery at three marine miles. An English act of 1833 assumes the marine league as the limit; Wheaton, Elements, Dana's ed. (1866) 256. See Lawrence, Int. Law, 5 ed. (1913) 141; Vattel, (1758) Chitty's Trans. Book I. §289; Wheaton, Elements, Dana's ed. (1866) 255n¹⁴.

§311

Width and Extent

been made to jurisdiction over a greater distance.⁸ The principle seems to be this. Each state admittedly exercises jurisdiction at least three miles from shore, but it is doubtful whether any state exercises any greater jurisdiction, and since the principle depends on protection as based on the range of artillery, the width of the belt will be likely to change from time to time with changes in the range of cannon.⁹ There is no agreement as to the point from which the maritime belt is to be measured; some say it is from low water line,

⁸ Norway claims four miles, Spain has claimed six miles. Institute of International Law resolved in favor of six maritime leagues or eighteen miles. See Resolutions at meeting of 1894, Carnegie Ed., 113. The Swedish claim of four miles was not admitted in the case of the "Elida" in the German Prize Court, 10 Amer. Journ. Int. Law, 916, where the ship was seized more than three miles off the Swedish coast, and being within four miles she was adjudged as being seized on the high sea. In the Behring Sea controversy, the United States claimed jurisdiction over waters beyond the three-mile limit, against which Great Britain protested. The matter was submitted to arbitration August 15, 1893, [see 1 Cobbett Cases, 3 ed. (1909) 124 et seq.] and the award against the United States was founded on the facts that the earlier Russian claim was not clear, had not been admitted by Great Britain, and the United States, therefore, had no claim outside three miles from the time of the purchase in 1867. Hall, Int. Law, 6 ed. (1909) 154n¹, however, denies that the three-mile limit was involved in the discussion. During war between Spain and United Provinces, James I. marked out along his coast certain boundaries within which armed vessels were forbidden. Great Britain has immemorially claimed exclusive jurisdiction over bays within lines drawn from one promontory to another, called "King's Chambers."

"British Hovering Act," 9 George II., Cap. 35 (1736), assumed, for certain revenue purposes, a jurisdiction of four leagues from the coast, extended by Act. 47 Geo. III, 11. sess. c. 66, to 100 leagues from the coast. The United States Revenue laws are similar; 1 Halleck, Int. L., 4 ed. (1908) 168n². See Hershey, Int. L., (1912) 195 et seq. See North Atlantic Coast Fisheries Arbitration, 1910; Hague Court Reports Carnegie ed., 141 et seq.; Hall, Int. Law, 7 ed. (1917); 4 Amer. J. Int. Law, 948 et seq.

⁹ In 1805, during war between Great Britain and Spain, the British privateer "Minerva" captured the Spanish vessel "Anna" near the mouth of the River Mississippi. When brought before the British Prize Court, the United States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favor of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud islands composed of earth and trees drifted down into the sea; The "Anna," 5 C. Rob. 332 (1805); 1 Oppenheim, Int. L., 2 ed. (1912) 301 et seq. "The territorial limits of the United States were not at this date precisely ascertained. An Act of Congress in 1794 fixed the range of cannon shot as the limit of U. S. juris-

The Maritime Belt

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others from high water line, and some argue that the line is to be drawn (A) from the middle of the first channel off shore;¹⁰ (B) from depth when water first ceases to be navigable; (C) from the point where coast batteries can still be erected.¹¹

Jurisdiction of Littoral and Foreign States in the Maritime Belt.**PRELIMINARY.**

§312. Several interesting questions arise as to the jurisdiction of the littoral and foreign state in the maritime belt. The littoral state, by reason of the proximity of the maritime belt to its own territory, can exercise its jurisdiction therein in many ways, but the foreign state can have access to the maritime belt only by vessels proceeding from the open sea except where the boundary between two states runs to the margin of the sea, in which case, as to the part adjoining the boundary line, other acts of jurisdiction are possible. No discussion has arisen as to such case, and our attention will therefore be confined to (A) vessels proceeding from the open sea; (B) fisheries; (C) coastwise trade; (D) treaties as to the maritime belt. Before proceeding to the discussion of these, we shall say a few words about (A) the nature of the jurisdiction of the littoral and foreign state, and (B) the municipal law of the littoral state concerning the maritime belt.

NATURE OF JURISDICTION OF LITTORAL AND FOREIGN STATE IN MARITIME BELT.

§313. There are two theories as to the nature of the jurisdiction of the littoral and foreign state exercised in the maritime belt. (A) One is that the absolute jurisdiction of the state stops with the shore line, and the marginal jurisdiction is qualified and exercisable only to the extent necessary concurrently with other states. (B) The other is that the absolute and exclusive jurisdiction extends to the

diction, and conferred upon the District Courts authority to restore prizes made in violation of the U. S. territorial rights so defined. In the subsequent case of the 'Fanny,' Peters affirmed his judgment in the 'William;' Walker, Science, Int. L., (1893) 321.

¹⁰ Hershey, Int. L., (1912) 195n¹; 1 Oppenheim, Int. L., 2 ed. (1912) 256.

¹¹ As to archipelago and whether maritime belt extends so as to include them, see Hall, Int. Law, 6 ed. (1909) 125. For discussion of the Archipiélago de los Canarios, see Hall, Int. Law, 6 ed. (1909) 125.

§314

Jurisdiction in

edge of the maritime belt, that the waters within which are as much a part of the territory of the state as the land is, and that any jurisdiction exercised therein by a foreign state exists merely because of limitations on the exercise of the absolute jurisdiction imposed by the international factors of conduct.¹² This is believed to be the proper view, particularly in view of the fact that the width of the maritime belt is based upon the extent of effective control from the shore, a jurisdiction sustained by artillery, which is about as absolute as any which can be imagined. A foreign ship comes from the high sea into the maritime belt under the command of her captain, who represents and exercises the jurisdiction of his own state. This jurisdiction is overcome by the superior jurisdiction of the littoral state, which may be completely exercised except so far as restrained by the factors of international conduct. It has been suggested that there is a sort of concurrent jurisdiction. Other writers have put the jurisdiction on the ground of waiver,¹³ which is unsound because there is no evidence of such an agreement and it is admittedly impossible to extend it to the case of the so-called right of innocent passage.¹⁴

MUNICIPAL LAW OF LITTORAL STATE AS TO MARITIME BELT.

§314. The littoral state may make such provisions of the municipal law as to the maritime belt as it sees fit, and it may refrain from exercising all of the power in the belt to which it is competent under the rules of international law. In any event, so far as the provisions of that municipal law are consistent with international law, no question will arise for the consideration of the international lawyer. Where, however, it exceeds the power exercisable under the international factors of conduct, there is an excess of jurisdictional power in the maritime belt.¹⁵

¹² For discussion of the views, see Hall, *Int. Law*, 6 ed. (1909) 152n¹; Hershey, *Int. L.*, (1912) 195n¹; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 255, 256; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 293; 1 Westlake, *Int. L.*, 2 ed. (1910) 187 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 68 et seq.; Vattel, (1758) Chitty's Trans. Book I. §288.

¹³ 1 Westlake, *Int. L.*, 2 ed. (1910) 264.

¹⁴ Where there is a dependent and independent state having jurisdiction over the same territory, questions will

arise as to the jurisdiction of each over the maritime belt. See Hall, *Int. Law*, 6 ed. (1909) 129; 2 Moore, *Dig. of Int. L.*, (1906) 16-18.

¹⁵ The jurisdiction of British courts over the maritime belt depends on statute. For discussion see 1 Halleck, *Int. L.*, 4 ed. (1908) 170-174, 191-197. (1878) 41, 42 Vict. C. 73, passed in consequence of the decision in the "Franconia" R. v. Keyn, 2 L.R.

Exch Div. 63 (1876); Woolsey, *Int. L.*, 6 ed. (1897) 70; Snow Cases, (1893) 55 et seq.

Vessels in the Maritime Belt.

PRELIMINARY.

§315. Public and private vessels have already been defined and the distinction between them pointed out.¹⁶ Public vessels are also to be divided in this connection into two kinds: (A) armed ships of war; (B) unarmed public vessels, the latter being more nearly of the character of private vessels, although no distinction of this kind has been drawn. We must also distinguish between voluntary and involuntary entry of a ship, and consider separately the case of a foreign state, a littoral state and a third state. Several theories have been advanced as applicable to public and private ships, which will be adverted to before proceeding to the discussion of each of them separately.

THEORIES AS TO JURISDICTION OVER VESSELS IN THE MARITIME BELT.

§316. Several theories have been advanced.¹⁷ It has been supposed that the fiction of extra-territoriality applies, and that a foreign ship entering the maritime belt presents a case of the impetration of the jurisdiction of one state by that of another. The fictitious nature of this idea, so far as the territorial power of the state is concerned, has already been pointed out,¹⁸ but the idea has more weight in the case of the maritime belt if we adopt the theory of qualified jurisdiction of the littoral state. Other writers have attempted the view that there is a right of innocent passage or navigation in the maritime belt, without defining the sense in which the word "right" is used. If it be used in the sense of power, a power which is unrestrained, then the exercise of that power by a foreign state is consistent with either theory, as it may be an exercise

¹⁶ See §§282, 285, ante.

¹⁷ Hall, *Int. Law*, 6 ed. (1909) 157-158, says is based on general consent and universal practice for one hundred years. See Lawrence, *Int. Law*, 5 ed. (1913) 194. Discussion of extra-territoriality by the following authors: Hall, *Int. Law*, 6 ed. (1909) 250; 1 Halleck, *Int. L.*, 4 ed. (1908) 232-245. It does not follow, however, as sug-

gested by Walker, *Science, Int. L.* (1893) 402, that if the notion of extra-territoriality be admitted as to the ship on the high sea, it remains when the ship enters the maritime belt. The maritime jurisdiction of the littoral state effectually strips away any supposed territoriality existing on the open sea.

¹⁸ See §221, ante.

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Voluntary Entry of Vessels

of qualified jurisdiction or of a power sustained by international factors of conduct.¹

INDIVIDUALS ALIGHTING FROM A VESSEL IN THE MARITIME BELT.

§317. The jurisdiction of the foreign state is confined to the ship, just as it was on the sea, and that jurisdiction is not extended by the entry of that ship into the maritime belt. As soon, therefore, as an individual leaves the ship in a foreign port, he departs from any vestige of the jurisdiction of his own state and comes completely within the power of the jurisdiction of the littoral state. This case, therefore, is to be discussed under the heading of "An independent state and aliens," and our attention at this point is confined to the ship itself lying at anchor within or passing through territorial waters. It has been suggested that when the crew of a ship are on shore officially in the service of the ship, they have the same immunity as when on board, but when on pleasure or leave, the immunity ceases.² The distinction is believed to be without weight and unsupported by practice or authority.

Voluntary Entry.

PRELIMINARY.

§318. In the case of voluntary entry, we have to distinguish between public vessels and private vessels. Much has been written about the entry of a public ship in the maritime belt and the writers

¹ The manner in which the jurisdiction of a captain of a foreign vessel in the maritime belt will be affected by the exercise of the jurisdiction of the littoral state is exhibited in the following table: (A) The conduct of the captain as captain in directing the movement of the vessel. (B) The conduct of those on board the vessel: 1. Who may be: (a) Members of the state whose flag the ship flies. (b) Members of the littoral state. (c) Members of a third state. 2. Any of whom may: (a) Come in on the vessel. (b) Go on board after she enters the maritime belt. See §§322,

326, post, on asylum. 3. Whose conduct may: (a) Affect those on board the vessel. (b) Affect persons on shore or anywhere in the maritime belt. (C) The manner in which the littoral state may act to aid its jurisdiction: (1) Request the ship to leave or expel it by force. (2) Board the ship and execute process on board. (3) Take persons off the ship and bring them on shore. (4) Detain the ship by force. See 1 Westlake, *Int. L.*, 2 ed. (1910) 270.

² 1 Oppenheim, *Int. L.*, 2 ed. (1912) 508.

have advanced several theories in connection therewith,³ some saying that there is a so-called right of innocent passage, others, that there is no such right. It seems clear that since the ship is an agent of the state capable of performing a state act, and is an agent of force and built primarily for use in war, that every such ship may be supposed to be subject to some restriction as to its entry. A distinction has accordingly been drawn, and some writers insist that such a ship may not enter without the consent of the littoral state, as it may come on a hostile errand and is capable, while in the maritime belt, of inflicting considerable damage. The entry of such a ship is not necessary to international commerce, and its visit may be hostile or friendly, and in the latter case is a mere parade of the naval power of the foreign state. No rule can be laid down, as the practice varies among the independent states of the world. In many cases, as in the states of Western Europe, restrictions are laid upon the entry of public warships, limiting the number, prescribing the harbor in which they may enter, requiring notice in advance through diplomatic channels, etc.⁴ It seems clear from these cases that each

³ Hall, *Int. Law*, 6 ed. (1909) 158; Hershey, *Int. L.*, (1912) 197, notes; Oppenheim, *Int. L.*, 2 ed. (1912) 259-260; Wheaton, *Elements*, Dana's ed. (1866) 158, 159n.

⁴ See regulations governing the visits of men-of-war promulgated by various countries, issued by the Office of Naval Intelligence of the United States Navy, corrected to June 10, 1916; 10 *American J. Int. L., Supp.*, 121-178. The United States of America has no regulation concerning the visits of foreign men-of-war to American ports in time of peace, except that they shall not visit certain harbors, to-wit: Tortugas, Florida; Great Harbor, Culebra; Guantanamo, Cuba; Pearl Harbor, Hawaii; Guam; Subig Bay, Philippine Islands; Kiska, Aleutian Islands; without first obtaining permission of the Secretary of the Navy through their respective Ministers and the State Department. Permission must similarly be obtained before such a vessel may enter the actual limits of a navy yard in any

port of the United States. Letter from the office of Naval Intelligence, Washington, D. C., dated March 29, 1919. Martens, G., *Law of Nations*, (1788) Cobbett's Trans. III. III. 2n, says the maritime powers often make treaties fixing the number of vessels of war that may enter or pass without special permission. Thus, Denmark and Genoa, in 1756, Art. 12, stipulated for three; Great Britain and Spain in 1667, Art. 16, fixed for eight. See provisions of the Treaty of Berlin of 1878 as follows: "The port of Antivari and all the waters of Montenegro shall remain closed to the ships of war of all nations;" Wilson & Tucker, *Int. L.*, (1901) 118. 1784—The Emperor of Austria attempted to open the navigation of the Scheldt and sent a ship flying the imperial flag for the purpose of ascending the river. When the ship refused to go back to sea, it was fired upon by Dutch vessels and compelled to anchor. The Emperor withdrew his ambassador from Holland and demanded satisfaction. The Dutch

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Ships Passing Through

independent state in fact exercises the power of restraining the entry of public ships in such manner as it deems best.

The entry of a private ship into the maritime belt is so essentially necessary to the current of international commerce that the self-interest of every state impels it to accord full privilege of entry to such vessels. The practice is in universal accord throughout the world and the case where any independent state will prohibit the entry of mercantile vessels to its ports except in time of war or under some particular temporary circumstances of quarantine, etc., would be almost unthinkable. The writers have argued at length on the matter, some have supposed that the entry of the ship rests on usage; others think the foreign state has a so-called legal right for its ships to enter, others a theoretical right, etc.⁵ This discussion proceeds upon the ambiguous use of the word "right" ⁶ and leads to no rational conclusion. The entry is dependent on commerce, necessity and self-interest, just as in the case of the movement of individuals from one state to another.

SHIP MERELY PASSING THROUGH THE MARITIME BELT.

§319. When a ship merely passes through the maritime belt without stopping at any port and without inflicting any damage, there is no practical reason for the littoral state to avow any jurisdiction; indeed, any action of that kind would be practically inconvenient and not worth the burden or expense of maintaining the necessary force.⁷ The littoral state has obviously the power to affect⁸ such vessels, but in practice does not exercise that power.⁹

merely offered an apology; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 50. The following distinguish between the passage of an army and the entry of a ship of war: Twiss, *L. of Nations, Peace*, 2 ed. (1884) 271, 272; Wheaton. Elements, Dana's ed. (1866) 158, 159,

⁵ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 259.

⁶ See §115, ante.

⁷ On the principle of the maxim *Injuria absque damno*, see Woolsey, *Int. L.*, 6 ed. (1897) 69.

⁸ The Duke of Savoy at one time levied a toll under the name of *Ville-franche*, on all vessels passing within eighteen miles distance from the port of Nice;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 305n⁴⁰.

⁹ The following distinguish and assert a so-called right of innocent passage: Hall, *Int. Law*, 6 ed. (1909) 202-204; Hershey, *Int. L.*, (1912) 196; 1 Westlake, *Int. L.*, 2 ed. (1910) 266.

Public Vessels in the Maritime Belt.

PRELIMINARY.

§320. A public armed ship of war represents the dignity and power of a state, and at the same time, is presumably an agent for the exercise of force by that state, and it therefore enters the maritime belt under a cloud of suspicion. There are several questions to be considered: (A) the jurisdiction of the littoral state; (B) asylum; (C) commissioning of ships in the maritime belt.

JURISDICTION OF THE LITTORAL STATE OVER A FOREIGN PUBLIC VESSEL.

§321. Since a public vessel is an organ of the state government, an agency for the use of international force, and represents the dignity and honor of the state, it follows that the only remedy a state has for the act of such a ship within its maritime belt is by setting in motion the international factors of conduct to which we have already referred, and that consequently such a ship is not subject to the process of the municipal court; in fact it is in the same position as an envoy.¹⁰ The littoral state, therefore, may either expel the ship by force from the maritime belt, which no doubt it may do in an extreme case for self-preservation, or request the foreign state to recall the ship. The public ship is not subject to municipal law while engaged in international violence; *a fortiori*, it is not subject when not engaged in international violence. The officers of the ship when performing a state act are not subject to the municipal jurisdiction, but they can only perform that state act on the deck of the ship. The minute they leave it, their capacity to function as naval officers ceases because they have nothing with them to command. The littoral state must, out of regard for its self-interest and the welfare of its inhabitants, enforce local regulations against such a

¹⁰ For discussion of public vessels, see (1866) 168; Wilson & Tucker, Int. L., Hall, Int. Law, 6 ed. (1909) 186-196; (1901) 117 et seq. For regulations concerning foreign men-of-war, issued by the Office of Naval Intelligence of the United States Navy, see 10 American J. Int. L., Supp. 121-178. 1 Halleck, Int. L., 4 ed. (1908) 230n²; 2 Moore, Dig. of Int. L., (1906) 662 et seq.; 1 Oppenheim, Int. L., 2 ed. (1912) 504; Walker, Man. Int. L. (1895) 80, 81; 1 Westlake, Int. L., 2 ed. (1910) 167; Wheaton, Elements, Dana's ed.

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Public Vessels In

vessel, and if it fails to comply, its own state will be requested to withdraw it. In practice, all public ships of foreign states within the maritime belt comply with many local regulations just as the envoy does, because the regulations are necessary to the commerce of the port and any objection to them will be trivial and have no bearing on maintaining the dignity of the state. A number of cases are referred to in the note.¹¹

¹¹ 1668, Spanish ships were seized in Flushing by Holland for satisfaction of a debt due from the King of Spain. Ships seem to have been released on interposition by States General; Wheaton, *Elements*, Dana's ed. (1866) 161; 1 Westlake, *Int. L.*, 2 ed. (1910) 266n⁴. 1794, an English sloop of war entered the harbor of Newport in Rhode Island. The State of Rhode Island sent some persons on board to ascertain whether American citizens were detained on board, and the captain, who was on shore, acting apparently under some constraint, furnished the state officials with a letter requiring the commanding officer to afford them assistance. Six Americans were found who were discharged by order of the captain. Great Britain complained; Hall, *Int. Law*, 6 ed. (1909) 186. Walker, *Man. Int. L.*, (1895) 79, says the captain was detained on shore and that the Attorney General of the United States of America seems to have been inclined to regard the action of Rhode Island as justifiable. In the case of the English packet "Chesterfield" in New York Harbor, the United States Government took the view that it was lawful to serve civil or criminal process on a British ship of war lying in an American harbor; Hall, *Int. Law*, 6 ed. (1909) 187 et seq.; Walker, *Man. Int. L.*, (1895) 79. 1856, the "Sitka," captured by the English from the Russians, came into San Francisco with a prize crew and some Russian prisoners on board. A California court issued a writ of habeas corpus, after service of

which the ship set sail without obeying its order. The United States admitted that the captain of the ship behaved properly; 1 Cobbett Cases, 3 ed. (1909) 258 et seq.; Hall, *Int. Law*, 6 ed. (1909) 190; Lawrence, *Int. Law*, 5 ed. (1913) 248. 1898, U. S. S. "Bancroft" was fired upon on entering the harbor at Smyrna, Turkey. She was unknowingly violating the regulations forbidding an entry into the harbor at night. Turkey apologized. United States ship was in a Japanese port, and it was held by the Supreme Court of the United States that the United States Consular Court of Japan had jurisdiction to punish a British sailor who formed part of the crew of the ship. 1903, the Government of the Netherlands refused to permit execution against a ship at Flushing belonging to Belgium and used as a training ship for pilots, on a judgment which had been obtained against Belgium and affirmed by the Supreme Court at the Hague; 1 Westlake, *Int. L.*, 2 ed. (1910) 283. "In the case of *Charles et George* (Martens' *Causes Celebres*, v. 605), the French Government claimed the exemption of a public ship for a private vessel engaged in a private commercial enterprise on the ground that she had on board an agent of the French Government to see that she did not violate the law of France forbidding the slave trade. The Portuguese Government had arrested the vessel for being engaged in that trade in Portuguese waters. The exemption was denied by Portugal, who yielded to the demand

ASYLUM IN PUBLIC FOREIGN SHIPS IN MARITIME BELT.

§322. Since the public ship within the jurisdiction is free from the process of the municipal court, it follows that any individual on board the ship is, in like manner, free, and subject to the jurisdiction of the foreign state. The question will then arise whether the members of the littoral state who come on board the foreign ship while it is in the maritime belt, will be, in like manner, free from process of the court of their own state.¹² It seems perfectly clear that in fact they are protected by the jurisdiction if the foreign state chooses to insist, but in practice the principal maritime states of the world decline to permit their public vessels to be used as an asylum for criminals. The commanders of such vessels will ordinarily, when requested, deliver them up to the local authorities, just as the envoy will refuse to permit the legation to be used as an asylum for criminals. The cases are exactly parallel. Political refugees have been sometimes considered as being in a different class, and in a country where revolutions frequently occur, the local politicians, when fleeing from each other, will seek refuge on warships of foreign powers. The question of how far the asylum is to be granted is entirely in the discretion of the foreign state. Some instances are referred to in the note.¹³

for restoration only on the ground of inability to resist the superior power of France. France refused to submit the case to arbitration. No European power offered aid to Portugal. The case has painfully the look of mere *vis major*," Wheaton, Elements, Dana's ed. (1866) 154. In the following cases it was held that the public ship was not liable to process of the municipal court; *The Exchange v. McFaddon et al.* 7, Cr. 116 (1812); 1 Cobbett Cases, 3 ed. (1909) 251 et seq.; *Snow Cases*, (1893) 103. Title of the ship. "The Parlement Belge" L.R. 5 P.D. 197 (1878); 1 Cobbett Cases, 3 ed. (1909) 255 et seq.; *Snow Cases*, (1893) 116. Damages caused by collision. The "Prins Frederik," 2 Dod. 451 (1820), The "Constitution," L.R. 4 P.D. 39 (1879); salvage.

¹² 1 Oppenheim, Int. L., 2 ed. (1912)

507; 1 Westlake, Int. L., 2 ed. (1910) 268, 269; Wilson & Tucker, Int. L., (1901) 119.

¹³ 1848, the British Government ordered a vessel to be ready to take the Pope on board in case refuge was needed. 1862, Revolution in Greece. A British frigate escorted a Greek man-of-war, with the King and Queen on board, out of Greek waters and took them on board as soon as some slight danger of mutiny appeared. 1898, Kang-yu-wei, a Chinese reformer who had escaped from Tien-tsin, was taken on board a P. & O. steamer at Wusung, which was escorted to Hong Kong by a British man-of-war; Hall, Int. Law, 6 ed. (1909) 194n¹. 1820, an Englishman took refuge on board a man-of-war at Callao after escaping from prison. Political offender. British Government law officer said Spain

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COMMISSIONING OF THE PUBLIC SHIP WITHIN THE MARITIME BELT.

§323. Private ships cannot be changed to a public vessel without government commission, which commissioning of vessels is a state act which cannot be performed in the jurisdiction of another state without the consent of the latter. The commission may be done outside the maritime belt, and then ship may re-enter as a public vessel.¹⁴

Private Vessels in Maritime Belt.

PRELIMINARY.

§324. The case of a private vessel in the maritime belt stands on a somewhat different footing because (A) the entry of the vessel is necessary for international commerce, (B) it is not an agent of violence, and by its entry raises no suspicion or idea of penetration of the jurisdiction by force, (C) it is not as potently capable of inflicting damage in the maritime belt as is a war vessel, (D) a public vessel rarely carries private property, and has infrequently anyone on board except the officers and crew. A merchant ship probably has and generally does have members of the littoral or other states on board as well as private property of members of different states. This variety of persons and interests results in the commission of acts calling for the exercise of some jurisdiction, which necessity and convenience designate as that of the littoral state.¹⁵

THE JURISDICTION OF THE LITTORAL STATE OVER THE PRIVATE SHIP IN THE MARITIME BELT.

§325. The jurisdiction of the littoral state over the private ship in the maritime belt is exercised to a different extent by different

would have been justified in employing force in taking the individual out of the vessel; Hall, *Int. Law*, 6 ed. (1909) 188. §692, post.

By Article 28 of the General Act of the Brussels Conference of 1890, relating to the African slave trade it was provided that slaves taking refuge on board a vessel of war of one of the signatory powers should be immediately and definitely freed, but not freed from prosecution for offences against the municipal law.

¹⁴ The principal instance in time of war is in the case of neutrality. See §692, post.

¹⁵ Hall, *Int. Law*, 6 ed. (1909) 199-202; 1 Halleck, *Int. L.*, 4 ed. (1908) 247n³; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 483 et seq.; Walker, *Man. Int. L.*, (1895) 47; Wheaton, *Elements*, Dana's ed. (1866) 163; Wilson & Tucker, *Int. L.*, (1901) 120.

countries, and there seems to be no universal rule on the subject.^{16*} The only principle we can lay down is that the exercise of the jurisdiction by the littoral state is essentially for the protection of the maritime belt and the preservation of the peace and safety of the port and the inhabitants thereof. The extent to which any particular littoral state may regard the exercise of that jurisdiction as necessary is entirely a matter of municipal law and we will, accordingly, find a considerable difference of practice, which is referred to in the notes.¹⁶ A case may arise involving doubt as to which of

^{16*} "The Lack of Uniformity in the Law and Practice of States with Regard to Merchant Vessels," Fred. K. Nielsen, 13 *Amer. J. Int. Law*, 1 et seq.

¹⁶ 1806, the "Sally" and the "Newton," private vessels of the United States of America were in French ports, and the United States consuls claimed jurisdiction in respect of offences committed on board them by and upon persons belonging to them. The French court decided in favor of the United States on the ground that the assistance of the local authorities had not been asked for, and that the tranquility of the port had not been compromised; 1 *Phillimore, Int. L.*, 3 ed. (1879-1888) 484; *Snow Cases*, (1893) 121; *Wheaton, Elements*, Dana's ed. (1866) 164. 1832, the private Sardinian steam vessel, "Carlo Alberto," landed parties on the coast of France with hostile intent against the French Government, and then entered another French port in distress. It was held by the French Court of Cassation that the arrest of persons on board on charge of treason was justifiable; *Wheaton, Elements*, Dana's ed. (1866) 166, 167. 1837, one of the crew of the Swedish vessel "Forsattning" then in the Loire, was accused of poisoning some of his fellowseamen. The French court directed the accused to be surrendered to the captain of the ship; 1 *Phillimore, Int. L.*, 3 ed. (1879-1888) 484, 485. 1841, "The Creole," an American

merchant vessel, sailed from a port in Virginia for New Orleans, having a number of slaves on board. The slaves seized the ship and entered Nassau. Some were arrested for the act of violence, others escaped. The question was whether, the ship having come in involuntarily, the slaves were still to remain as slaves on board. It was finally decided that the act of the British Government in assisting the escape of the slaves by force was an unwarranted invasion of the jurisdiction of the ship. See discussion, *Wheaton, Elements*, Dana's ed. (1866) 165n²; quoted in *Snow Cases*, (1893) 136. Merchant ship entering Charleston before 1861, with free negroes on board. The negroes were subject to the territorial law forbidding them to be at large, whereas if a ship containing a slave came into the jurisdiction of Great Britain, the British court would have jurisdiction to order such slave set free; *Twiss, L. of Nations, Peace*, 2 ed. (1884) 273. 1859, the United States merchantman "Tempest" was in a French port, and the mate was convicted in a French court for the murder of one of his sailors on board, *Snow Cases* (1893) 122; 1 *Westlake Int. L.*, 2 ed. (1916) 271n¹. 1876, French merchantman "Ane-mone" was in a Mexican port, and one Frenchman murdered another on board. The court of Mexico held that the Mexican Government had no jurisdic-

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two jurisdictions is involved. In such a case the local jurisdiction will have to decide because it in fact exercises the power of jurisdiction and has the parties within its grasp and can therefore in fact act subject to the risk of exposing the state of which it is a part to remonstrance from the other state on the ground of international conduct objectionable to the latter.

ASYLUM IN PRIVATE VESSELS IN MARITIME BELT.

§326. The question has been raised whether a passenger on a merchant ship which on the course of its voyage comes within the jurisdiction of an independent state, may be taken off the ship when it is within territorial waters. These cases have arisen particularly in connection with incidents arising in South America where revolutions are of such frequent occurrence, and politicians are constantly fleeing from one jurisdiction to another for safety.¹

LITTORAL STATE—FOREIGN SHIP AND VESSEL OF THIRD STATE.

§327. Cases may occur where two foreign ships are in the maritime belt and one interferes with the other. Where the interference is between two private ships either of the same state or of different states, the matter falls entirely within the cognizance of the courts of admiralty in the same manner as is exercised with respect to such interference on the high seas. Where the interference is by a public

tion, the tranquility of the inhabitants of the port not having been disturbed, and the people of the ship having simply brought the body on shore without making any accusation or asking protection; 1 Westlake, *Int. L.*, 2 ed. (1910) 271n¹. 1886, one Belgian killed another on board a Belgian steamer moored to a dock in a United States port. He was arrested by the local authorities, and it was held, on appeal to the Supreme Court of the United States, on a writ of habeas corpus, that the Belgian consul could not obtain jurisdiction of the accused; *Wildenhus's Case*, 120 U. S. 1 (1886); 1 Cobbett Cases, 3 ed. (1909) 277 et seq.; 1 Westlake, *Int. L.*, 2 ed. (1910) 271n; *Snow Cases*, (1893) 126. See

legislation of Newfoundland relating to foreign fishing vessels; 1 American J. *Int. L.*, Supp. 22, 24.

¹ When some of these gentlemen have taken passage upon American ships and the ship has subsequently come within the jurisdiction of a state which would like to have them, they have been taken off the ship. The United States of America has generally acquiesced in such seizure, on the ground that there is no extra-territorial immunity which extends to a merchant vessel, although in most cases it has addressed a diplomatic protest to the state concerned and endeavored to use its good offices in the matter; 2 Moore, *Dig. of Int. L.*, (1906) 855 et seq.

ship of the state against a private ship of its own state, the controversy is as much a matter of the municipal law of the foreign state as if it had occurred upon the high sea. The presence of the maritime jurisdiction would make no difference. Where, however, a public ship of one state interferes with the public or private ship of another state, then we have an act of trespass or interference, which, if perpetrated on the high sea, may, under certain circumstances, be an invasion of the jurisdiction. The question is whether any different rule applies if the act occurs in the maritime belt. There seems to be no reason to suppose that there should be any difference as to those acts which might occur in time of peace except that the littoral state would be in a position to insist that the act of interference was against its consent, and therefore to be complained of on the theory that the state of the foreign private ship would expect to have that ship protected while in the maritime belt by the jurisdiction of the littoral state, and therefore look to it for remedy in case that protection was not afforded. The case of interference in the maritime belt in time of war in committing acts of international violence, is referred to in a subsequent part of the discussion.³

INVOLUNTARY ENTRY IN MARITIME BELT.

§328. Involuntary entry into the maritime belt will occur in case of shipwreck³ or distress or a ship of a belligerent fleeing into neutral waters from the pursuit of an enemy.⁴ The modern practice in case of shipwrecks or distress is to treat the unfortunate mariners with considerations of humanity. In former times the treatment was more severe.

FISHERIES IN MARITIME BELT.

§329. The coast fisheries within the maritime belt are generally used by the coast states, and other states are excluded from fishing therein. The marginal jurisdiction is generally conceded to include fisheries⁵ in the maritime belt, and the habitual practice of states

³ See §694, post, on captures in maritime belt of neutral state.

⁴ Wrecks; Vattel, (1758) Chitty's Trans. Book I. §293; Martens, G., Law of Nations, (1788) Cobbett's Trans. III. III. 2n.

⁵ See §883, post, on involuntary entry in time of war.

⁶ 1 Oppenheim, Int. L., 2 ed. (1912) 258; Twiss, L. of Nations, Peace, 2 ed.

(1884) 311 et seq.; Woolsey, Int. L., 6 ed. (1897) 75n²; Vattel, (1758) Chitty's Trans. Book I. §287. Lawrence, Int. Law, 5 ed. (1913) 202 et seq., discusses sea fisheries and coast fisheries together, without apprehending that they depend on different principles. See §948, post, on exemption of coast fisheries from seizure in war.

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is to leave each other in the sole, exclusive possession of coast fisheries.⁶

COASTWISE TRADE.

§330. Coastwise trade is trade in the maritime belt between different ports of a littoral state, and also trade between two ports of the same state, although the intervening voyage passes over a branch of the open sea. Coastwise trade is entirely within the jurisdiction and power of the state whose marginal belt is under discussion, and it may exclude all other vessels from participation therein.⁷ Since coast vessels do not venture on the open sea except incidentally in passing to and fro, they are generally free from some of the restrictions as to papers, registry and clearance required of ships navigating in the open sea.⁸

TREATIES AFFECTING MARITIME BELT.

§331. Treaties may be made affecting the maritime belt and a cession of jurisdiction may be made within the three-mile limit, but

* Vattel, (1758) Chitty's Trans. Book I. §287, says, that as England did not originally take exclusive possession of the herring fisheries on their coast, it has become common to them with other nations. See Wheaton, Elements, Dana's ed. (1866) 258. 1617, a Dutch ship refused to pay the duty demanded by Great Britain for fishing upon the coast of Great Britain and Ireland, and the ships convoying the fishermen carried off the man who demanded the payment and an officer of the Admiral of Scotland to Holland. James ordered reprisals on Dutchmen in London, and demanded the release of the prisoners and the punishment of the offenders. The Provinces sent the captors to England for punishment but disavowed the action of the two commanders. See Vreeland, Grotius, (1917) 56, 57. Maritime fisheries of Great Britain and France regulated by Treaties of 1839 and 1867; Hall, Int. Law, 6 ed. (1909) 155n¹; 1 Halleck, Int. L., 4 ed. (1908) 176n¹; Wheaton, Elements, Dana's ed. (1866) 259. Newfoundland Fisheries.

The controversy between Great Britain and the United States of America was in part over the privilege of catching fish and drying them along the coast. For discussion, see 1 Halleck, Int. L., 4 ed. (1908) 176, 177; Wheaton, Elements, Dana's ed. (1866) 261, 342 et seq.; Woolsey, Int. L., 6 ed. (1897) 75, 76. Submitted to Hague Court of Arbitration in 1910. "North Atlantic Coast Fisheries Case," Hague Court Rep., Carnegie Ed., 141 et seq. "North Atlantic Coast Fisheries Arbitration at the Hague. Argument on behalf of the United States," by Elihu Root. (1908) April 11—Fishing in waters contiguous to Canada and the United States of America regulated by Treaty of Washington of April 11, 1908, between Great Britain and the United States of America. For text, see 2 American J. Int. L., Supp., 322 et seq. See 2 Amer. J. Int. Law, 637.

⁷ 1 Oppenheim, Int. L., 2 ed. (1912) 258.

⁸ See §976, post, on rule of 1756.

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obviously no such concession beyond the limit can be valid except as to the member of the state making the concession.⁹

MARITIME CEREMONIES IN MARITIME BELT.

§332. Maritime ceremonies in the maritime belt are the recognition of the jurisdiction of the littoral state, and accordingly a foreign man-of-war entering the jurisdiction must comply with the rules of the littoral state as to those ceremonies as a matter of courtesy, just as one gentleman entering the house of another complies with the rules, whatever they may be, of his host.¹⁰

SUMMARY.

§333. The open sea and the maritime belt require separate discussion, as no state has exclusive jurisdiction in these places, and in some of them there is a conflict between the jurisdiction of different states.¹

A state which does not border on the open sea is non-maritime and has a limited interest therein, as to which no question has been

⁹ Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 1, 283, puts the case of an agreement between China and Great Britain, by which Great Britain has jurisdiction over British subjects in China, "Being within the dominion of the Emperor of China or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China." The question is as to the validity of the latter clause. It cannot affect the ships of any state except China and Great Britain. As to Great Britain, the jurisdiction already exists, and from the point of view of China it is a waiver of its own jurisdiction over its own peoples within the hundred miles. Suppose, however, a French ship should come within the hundred miles. It is clear that France would not consider itself bound by the waiver made by China. Great Britain made a number of treaties with various states for the recovery of deserting seamen from each other's ships; 1

Phillimore, *Int. L.*, 3 ed. (1879-1888) 486. The Hague Convention of May 6, 1882, between Denmark, Belgium, Great Britain, France, Germany and the United Netherlands, conferred certain littoral privileges on the subjects of the contracting states, as to the North Sea fisheries.

¹⁰ For discussion, see 1 Halleck, *Int. L.*, 4 ed. (1908) 135 et seq.; Martens, G., *Law of Nations*, (1758) Cobbett's *Trans.* IV. IV. 5; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 319 et seq.; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 52, et seq. Some cases occur where ships refuse to observe the maritime ceremonies, but they are rare: 1563, Philip II. of Spain ordered that the flag bearing the imperial arms should not be lowered in any foreign port. 1691, French ship passed the Genoese citadel without saluting; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 53.

¹ See §275, ante.

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raised in international relations.² The sea is the great body of salt water which covers the greater part of the surface of the earth and is referred to by international lawyers as the high or open sea.³ It may be used for navigation and fishing, the subsoil for telegraphic cables, and the aerial space above it for wireless telegraphy and aeronautics. No question has been raised of cables except as to their use in time of war, and the utilization of the aerial space is as yet too limited to be of any practical importance.⁴ No state has any jurisdiction over the open sea, and its interest in it is confined to vessels and persons and goods thereon and to fisheries. This absence of any state jurisdiction is not, as is commonly supposed, owing to the nature of the sea as a fluid body, but because no state has been able to sustain any jurisdiction therein.⁵ Many claims were formerly made, but they have all disappeared in the face of the opposition of other states, which opposition has been aided by the growth of international sea-borne commerce.⁶

When, however, we speak of the "freedom of the sea," we only mean that the sea is free to the use of the independent states of the world. No private individual has any freedom in the use of the sea in his status as an individual. He can only venture on the open sea under the protection of his own state and as a member of that state, and with his vessel properly identified as entitled to fly the flag of that state. If he assumes to go forth on the bosom of the sea on his own footing, he is a pirate, and may be seized as such by any independent state, and when so seized he cannot claim the protection of his own state, because he renounces it before setting out on the voyage.⁷ The principal use of the sea is for navigation, which is by vessels, and they are of two kinds, public and private.⁸

A public ship is one belonging to the state or temporarily under the control of the officers of the state, and identified as such by a proper commission and documents. A private vessel is a ship owned by private individuals, and not the property of or under the control of the state. All such ships are registered by provisions of the municipal law, as may be prescribed in each state, and unless a private vessel is so registered and entitled to the protection of its own state, it has no status on the high sea. There is no rule of international law applicable to this subject, as each state may in its discretion make such regulations concerning its own shipping as it

² See §276, ante. ³ See §277, ante. ⁴ See §278, ante. ⁵ See §279, ante.

⁶ See §280, ante.

⁷ See §281, ante.

⁸ See §282, ante.

sees fit. There is, however, a considerable uniformity of regulation on the subject, which uniformity is desirable as a matter of international convenience in transacting business on the high sea.⁹

The jurisdiction of a state over its vessels on the high seas is exercised through the captain, who leaves the maritime belt of his own state in command of the vessel and subject to that jurisdiction, in whose name he exercises his authority over the crew and all persons on the ship until overcome by another jurisdiction, which may be either a superior force on the high sea or the maritime jurisdiction of another state. The moment the captain disregards the jurisdiction to which he was subject, he becomes a pirate and may be dealt with accordingly.¹⁰ There is no distinction between the jurisdiction exercised over public ships and private ships, except that in the case of public ships the jurisdiction is intensified because of naval discipline. A public ship, in addition, represents the dignity and honor of the state and is its regular agent for the doing of state acts and the committing of international violence.¹¹

Pirates were very numerous prior to the beginning of the nineteenth century, and they were bodies of men which were not subject to the jurisdiction of any state, and roved the high seas for objects of plunder and booty. Any state might seize such a band and inflict such penalties as it might see fit, for the simple reason that the band had no state to protect them, and no other independent state was therefore affected by such seizure. These men were generally violent and wicked individuals, and therefore the idea of piracy came to have, even in the minds of international law writers, somewhat the schoolboy idea of a body of men organized for purposes of crime. It is apprehended, however, that this is an error, and that while pirates are mostly men of this stamp, yet the notion of piracy in its abstract sense is simply that of a body of men on the high sea without the flag of any state.¹² Each state may therefore seize such individuals upon the open sea, and upon bringing them within the jurisdiction punish them in such manner as is prescribed by the municipal law. A state may designate a particular crime as piracy by its municipal law, but such designation obviously cannot make the act piracy as known in international law unless it contains the ingredients of that crime, which must be committed outside the jurisdiction of any state.¹³

⁹ See §283, ante.

¹² See §287, ante.

¹⁰ See §284, ante.

¹³ See §288, ante.

¹¹ See §285, ante.

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Belligerents are not generally tried as pirates in modern times, although the leaning formerly was towards visiting them with the greatest severity. The recognition among modern democracies of the entire freedom of the people to revolt and set up a new government if they see fit, has led to a more tender view of the ships of such communities on the high sea.¹⁴ Privateers, however, have fallen into disfavor, and have sometimes been treated as pirates.¹⁵

The remedy against pirates is by seizure on the high sea and bringing the ship into port for condemnation, and the penalty of death is generally inflicted. The public ships of a state enforce the remedy, and they may visit and search a ship on suspicion of piracy, but do so at their peril if the facts are otherwise.¹

The navigation of the open sea by ships will inevitably lead to interferences between them. When ships of the same state are concerned, the question is one of municipal law.² Interference between private ships of different states may be accidental or intentional, and, in any case, is the act of a private person, and the general custom is for the admiralty courts of each state to take jurisdiction irrespective of the state membership of the vessels concerned, although there is a slight difference in practice amongst them as to the exact extent of this jurisdiction.³ Interference by a public ship of another state is an act of state beyond the jurisdiction of the municipal court, and the only question is—how far is the power of every state to interfere in such cases restrained by the international factors of conduct?⁴ Such acts of interference by a public ship may be analyzed as follows: (A) The verification of the character of a ship by signal or outward inspection without detaining the ship or altering its course; (B) the verification of the character of the ship by stopping her and sending someone on board to examine the papers or requiring the captain to bring the papers to the examining ship; (C) the search of the ship to ascertain what is on board; (D) seizure of all or part of the cargo or individuals on the ship and then allowing the ship to go on its course; (E) capture of the ship; (F) destruction of the ship not accompanied by destruction of individuals on board; (G) destruction of the ship and individuals on board.⁵ These acts may occur in time of war as part of the conduct of hostilities, which is subsequently discussed, or in time of peace, in which case when an interference occurs, the state interfering will justify the

¹⁴ See §289, ante.¹⁵ See §291, ante.¹ See §291, ante.² See §292, ante.³ See §293, ante.⁴ See §294, ante.⁵ See §295, ante.

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act as done: (A) In the course of policing the high seas;⁶ (B) as a measure of self-preservation preventing filibustering expeditions or other acts on the high sea threatening its safety;⁷ (C) to suppress the black slave trade where the interference is entirely by agreement among the various independent states of the world.⁸

Fisheries in the open sea may be used by any state, and are therefore subject to the common interest of all states, the result of which is that many fisheries are regulated by treaty in the interests of all.⁹ If islands in the sea are near enough to the mainland they are generally in the same ownership as the land to which they are adjacent. If in the open sea, they are subject to discovery and occupation just as other parts of the earth's surface. A few cases have arisen of islands in the Pacific Ocean, but they are of minor importance as they are of no particular value and the valuable ones have long since been occupied by independent states.¹⁰

The aerial space over the sea may be used only for flying, and owing to the recent invention of this method of transportation, there is no practice as yet on the subject. The subsoil has been used for telegraph cables and as to which no question has arisen except concerning their use in time of war.¹¹

The branches of the open sea are portions of the open sea almost entirely surrounded by land, where the presence of the land around the body of water raises a strong claim to jurisdiction over the water itself. Here the jurisdiction of the state over the branch of the open sea is an adjustment of the conflict between the extension of the freedom of the sea to the branches and the presence of the maritime jurisdiction of the state within whose territory the branch is. As may be expected, the force of the claim to the maritime belt increases with the decrease in size of the branch of the open sea.¹² These branches include small seas,¹³ gulfs, bays¹⁴ and straits. Where the mouth is less than six miles wide, it is clear that the maritime belts of the opposite sides unite, and the state controls the entire outlet of the body of water. Where the mouth is more than six miles wide, in many cases claims have been made to exclusive jurisdiction over the entire body of water within. It seems as if here the real principle is one of proportion. If the body of water lies entirely or largely within the territory of the state, then the terri-

⁶ See §297, ante.⁷ See §298, ante.¹⁰ See §301, ante.¹¹ See §302, ante.⁸ See §299, ante.⁹ See §300, ante.¹² See §303, ante.¹³ See §304, ante.¹⁴ See §305, ante.

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torial claim will prevail, even though there is a wide mouth, but if the body of water is only partially enclosed, then the freedom of the sea will prevail.¹⁴

Straits from one branch of the sea to another are of several kinds: (a) Those passing entirely through the territory of a state. (b) Those passing between the territory of two or more states. (c) Those connecting the open sea with inland waters.¹⁵ In all cases of straits, the principle of freedom of navigation is concerned, and if the strait connects two branches of the open sea, then the interests of all require that the strait should be open to the navigation of every ship.¹ If the strait connects waters exclusively in the jurisdiction of one state with the open sea, then the navigation of the strait can be controlled by the inland state controlling the waters which it connects with the sea.² If the strait is less than six miles wide, then the two opposite maritime jurisdictions will coincide, and there will be a question of passage through marginal waters instead of a question of navigation in a branch of the open sea.³ Where a strait is more than six miles wide, there will be an interval where the maritime jurisdiction will not coincide and over which the jurisdiction will be the same as that in the open sea.

The maritime belt is the strip of water where the open sea washes the edge of the land territory of any state.⁴ It is obvious that at this point the exclusive jurisdiction of the state over its own territory meets the complete freedom from any jurisdiction of the open sea, and as may be expected there is a conflict between these two facts which would lead to impracticable consequences if no rules were established. The littoral state, by which is meant the state abutting on the sea, has certain jurisdiction in the marginal waters. There is a conflict in opinion and practice in the first place as to the extent of the marginal waters, that is, the width of the maritime belt.⁵ The three-mile or one maritime league limit was suggested in the eighteenth century as that was then the range of shot fired from a cannon at a fixed position on shore. This limit has been generally assented to, but claims have frequently been made to a greater distance, which cannot be said to have received unanimous consent. Since the jurisdiction depends on protection, based on the range of artillery, it seems reasonable to suppose that the width of the belt should be enlarged in modern times with the increase in the range of

¹⁴ See §306, ante.

¹ See §307, ante.

² See §309, ante.

³ See §308, ante.

⁴ See §310, ante.

⁵ See §311, ante.

cannon. There is also a controversy as to the point from which the maritime belt is to be measured, whether from low water line, from high water line, or from the middle of the first channel off the shore.

The littoral state by reason of the proximity of the maritime belt to its own territory, can exercise its jurisdiction therein in many ways, but the foreign state can have access to the maritime belt only by vessels proceeding from the open sea except where the boundary line between the two states runs to the margin of the sea. The interest of the foreign state in the maritime belt is confined to vessels therein, and no distinction has been drawn as to any other case. Such a vessel is completely outside the grasp and jurisdiction of its own state, and is subject, for the time being, to the jurisdiction of the littoral state.⁶

Two theories have been entertained as to the jurisdiction of the littoral and foreign states in the maritime belt. One is that the absolute jurisdiction of the littoral state stops with the shore line, and the jurisdiction exercised in the maritime belt is qualified and exercised jointly or concurrently with the foreign state, which also has a sort of qualified jurisdiction therein; that is to say, the littoral state proceeds in the maritime belt by carving something out of the absolute freedom of the open sea. The other theory is that the territorial jurisdiction of the littoral state extends to the outer edge of the maritime belt; that the waters within are as much a part of its territory as the land is, and that the so-called jurisdiction of the foreign state, so far as it is exercised in the maritime belt, is so exercised because of the international factors of conduct superimposed on the absolute jurisdiction of the littoral state and determining its exercise in the ways to which reference will be made; that is to say, the foreign state proceeds in the maritime belt by carving something out of the absolute jurisdiction of the littoral state.⁷

The littoral state may by its municipal law protect and provide for its jurisdiction in the maritime belt, and no question in international law will arise until such municipal law exceeds the limits of the maritime jurisdiction from an international point of view, which occurs when the municipal law authorizes one of its public vessels to seize a foreign ship in the open sea beyond the maritime belt for acts done in or anticipated to be done in the maritime belt or where the littoral state interferes with the jurisdiction of the foreign state over its public ships.⁸

⁶ See §312, ante.

⁷ See §313, ante.

⁸ See §314, ante.

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Summary

The principal controversy in the maritime belt arises over vessels which are public or private and as to each of which the entry may be voluntary or involuntary.⁹ Various theories have been advanced in explanation of the status of the foreign vessel in the maritime belt, most of which are lacking in solidity of reasoning. The true theory seems to be this: the foreign ship leaves her own shores subject to the personal jurisdiction of her own state and carries that jurisdiction with her on the voyage across the open sea, which remains until replaced by a stronger jurisdiction, and when she enters the maritime belt she comes entirely within the jurisdiction of the littoral state in the maritime belt, which, for the time being, displaces the jurisdiction of the foreign state.¹⁰

The voluntary entry of the foreign ship into the maritime belt is necessary, at least so far as the private vessel is concerned, for the purposes of international commerce and the self-interest of every civilized state powerfully impels the opening of the maritime belt to all such vessels. The writers have elaborately discussed the question, and a distinction may be drawn as to a public armed ship of war, which is an agent of international violence and therefore enters the maritime belt under a cloud of suspicion, and at the same time is not necessary for the purposes of international commerce.¹¹

Many states impose restrictions of various kinds on the entry of public ships of war and no question appears to have been raised as to the validity of these restrictions. It seems then, in spite of the statements of the writers, that the entry of such a vessel in the maritime belt is entirely subject to the consent of the littoral state, in peace as well as in war.¹²

The mere passage of a foreign ship through the maritime belt presents a case of such fleeting contact with the littoral jurisdiction that no practical question arises in modern times. The writers have also discussed the question whether a ship has a so-called right of passage, by which they obviously mean power of passage. It is clear that the ship has that power, and the only question is whether it is restrained by the littoral jurisdiction of the maritime state. In practice such power is frequently exercised without objection, and even if an infraction of the jurisdiction of a littoral state amounts to what would be a trespass at English law. It would not inflict any actual damage, and therefore entirely outside legal notice on the principle that the maxim of *injuria abque damno* applies.¹³

⁹ See §315, ante.

¹⁰ See §316, ante.

¹¹ See §318, ante.

¹² See §319, ante.

Where the public ship enters the maritime belt, it comes representing the honor and dignity of the state and as an agent or arm of the state for the performance of state acts and the exercising of international violence, which, as we have already pointed out, is entirely beyond the jurisdiction of the municipal court.¹³ Such a ship is in the same position as an envoy, and the remedy of the littoral state for any act of damage done by her is to demand her recall by the foreign state, or, in extreme cases, forcibly expel her, and any further proceedings in such case are between the states concerned by way of international remedy. So also the municipal court of the littoral state is precluded from exercising any jurisdiction over such a foreign ship of war.¹⁴

If the member of a littoral state comes on board a public vessel, he comes within the grasp of the state and cannot be taken from the ship without damaging the interest of the foreign state in its vessel, and subjecting it to process from which, as has been before pointed out, she is exempt. The surrender of the individual is in the discretion of the commanding officer of the vessel in question and is in practice never refused in the case of criminals in modern times. In some cases where the country is unsettled and revolutions are of frequent occurrence, asylum is claimed upon foreign ships of war happening to be in the ports of the state, by the various politicians running from each other. The question of the granting of the asylum in such case is entirely in the discretion of the foreign state, and it seems clear that the littoral state can make no complaint upon any international ground if the asylum is refused nor can any individual, therefore, insist upon the asylum being granted.¹⁵

The commissioning of a public vessel is a state act which cannot be performed in the maritime belt against the objection of the littoral state. No question arises in time of peace, and such acts are of frequent occurrence at shipyards where vessels are built for foreign powers. In time of war a question will arise as to a violation of neutrality.¹

The private vessel is entirely within the grasp of the littoral state, and no exemption can be claimed on her account. The littoral state must exercise its jurisdiction for the protection of the inhabitants and every other consideration must give way. What occurs on board a vessel in the maritime belt, as drunken brawls, obscene behavior, murders, etc., is ordinarily of no concern to the inhabitants,

¹³ See §320, ante.

¹⁴ See §321, ante.

¹⁵ See §322, ante.

¹ See §323, ante.

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Summary

but may be an affront to public decency or undermine public morals and order. It is for the littoral state to decide in its discretion when those circumstances are present calling for the exercise of its jurisdiction over the private ship. Accordingly, we find a diversity of practice among the different states of the world. There is no international factor of conduct restraining exercise of the power of the littoral state over a private vessel in the maritime belt any more than there is a factor restraining similar exercise over an alien within the landed jurisdiction of the state. In the latter case it is admitted by all that the alien is subject to the criminal jurisdiction of the state.²

Where a foreign ship is attacked or damaged by a ship of a third state in the maritime belt, there is an offence against the jurisdiction of the littoral state of which it alone may complain. The principal instance arising under this heading is that of a seizure or attack in time of war, which is discussed in a subsequent chapter.³

Involuntary entry in the maritime belt is of quite frequent occurrence in the case of ships driven in by stress of weather, forced to put into port for repairs or water, or wrecked on the shores of the sea. These cases are referred to from time to time under the heading of blockade, violations of neutrality, and do not call for any particular comment at this place.⁴

Fisheries in the maritime belt are universally admitted to be solely the property of the littoral state, and the members of no foreign state can enter the maritime belt for the purpose of fishing or for the purpose of curing and drying fish on the shores without the consent of the littoral state.⁵

In like manner, coastwise trade is under the entire control of the littoral state. This is so because coastwise vessels do not usually venture on the open sea except incidentally in passing to and fro, and they must enter and leave the port of the state entirely under the control of the littoral state. While such state cannot interfere, therefore, with an entry or sailing of a ship to and from the open sea to a foreign port because by so doing it will interfere with the freedom of navigation on the open sea, it can interfere with or prevent a clearance to and from another of its own ports. The colonial policy which obtained in Europe during the eighteenth century extended this principle to trade with the colonies, and the various states of western Europe limited trade between the colonies and the

² See §325, ante.³ See §327, ante.⁴ See §328, ante.⁵ See §329, ante.

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mother country to their own ships. The economic fallacy of this policy has long since been demonstrated, and trade with the colonies is now generally free to ships of all states.⁶

While a treaty may be made affecting the maritime belt, it can only operate as to the territorial waters, because the part of the sea beyond that limit cannot be made the subject of any treaty between two states.⁷

Maritime ceremonies in the maritime belt are distinguished from those in the open sea, because in this case the jurisdiction of the littoral state in the territorial waters is paramount, and therefore ships entering these limits are, as it were, guests of the littoral state, and in rendering maritime ceremonies usually recognize that fact.⁸

⁶ See §330, ante.

⁷ See §331, ante.

⁸ See §332, ante.

CHAPTER 7.

TREATIES.

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PRELIMINARY.

§340. We have now reached that branch of the subject which bears the strongest analogy to contracts as known in the municipal law, for a treaty bears a striking resemblance to an agreement between individuals. We must not, however, let ourselves be misled into imagining analogies between them which do not exist.¹ The principal distinction lies in the circumstance that a contract is enforced by the political power of the state, whereas a treaty is enforced, if at all, only by the international factors of conduct.² Other distinctions

¹ See §§125, 126, ante, on distinction ² See §105, ante, on international factors of conduct.
law.

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Definition, Form, Language

and some analogies will be pointed out as the discussion proceeds. The first topic of importance is the formation of the treaty as preliminary to which we shall consider the definition, form and language.³

DEFINITION, FORM AND LANGUAGE.

§341. A treaty may be defined as a formal agreement between two or more states to do or not to do a particular thing. It must therefore be entered into by states, and an agreement between them is essential. A number of definitions have been collected in the note,⁴ most of which, it will be observed, attempt too much, and, as a result, limit the definition.

³ "Treaties may be considered with reference to: (1) the antecedent conditions upon which their validity depends, (2) their forms, (3) their interpretations, (4) their effects, (5) certain means of assuring their execution, (6) the conditions under which they cease to be obligatory, (7) their renewal;" Hall, *Int. Law*, 6 ed. (1909) 317. [Treaties] "may be considered in respect of, first, their different kinds; secondly, their duration; thirdly, their construction;" 1 Wildman, *Int. L.*, (1849) 138.

⁴ "International Treaties or Conventions are agreements or contracts between two or more States, usually negotiated for the purpose of creating, modifying or extinguishing correlative rights and reciprocal obligations;" Hershey, *Int. L.*, (1912) 311. "A treaty is the definition, by two or more separate States, of a specific jural relation actually subsisting between or among them, which definition they engage to accept and enforce as positive law;" 1 Lorimer, *Inst.* (1883-4) 260, 261. "Express covenants made between nation and nation, are called public covenants or treaties;" Martens, G., *Law of Nations* (1788) Cobbett's Trans. II. I. 2. "A treaty, or, to employ ancient terminology, a public treaty, is a convention agreed upon between two or more political communities;" Ernest Nys, 6 *Amer. J. Int. Law*,

282. "International treaties are conventions or contracts between two or more States concerning various matters of interest;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 540. "Treaties . . . are the written portions of that Law which binds together the Society of States, and they occupy a place in that system, which, in some degree, corresponds to the place occupied by statutes in the system of the Municipal and Public Law of Independent States;" 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 69. "A treaty . . . is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time;" Vattel, (1758) Chitty's Trans. Book II. §152. "Treaties, properly so called, or *foedera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire of course: (1) In case either of the contracting parties loses its existence as an independent State. (2) Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded. * * * (3) In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture;" Wheaton, *Elements*, Dana's ed. (1866)

Treaties are nearly always reduced to writing, as the transaction is too important to be left to the fleeting memory of the negotiators.⁶ An agreement between states may, however, be indicated in any other way, as by symbols, raising a white flag, exchange of notes, and, among autocrats, by word of mouth.⁶ The Latin language was uniformly employed until the middle of the seventeenth century, after which French was used. In modern times, when the parties to a treaty use different languages, the custom is to have the treaty drawn up in the language of each in parallel columns.⁷

351. "Treaties are contracts of independent states for the benefit of one or more of the contracting parties;" 1 Wildman, *Int. L.*, (1849) 138. "A treaty is an agreement between two or more states in conformity with law;" Wilson, *Int. L.*, (1910) 191. "A treaty is the most formal agreement between states, and usually relates to matters of general concern, as a treaty of peace, or to matters of high importance, as a cession of territory;" Wilson, *Int. L.*, (1910) 191. "A treaty is an agreement, generally in writing, and always in conformity with law, between two or more states;" Wilson & Tucker, *Int. L.*, (1901) 198. "Treaties, allowed under the law of nations, are unconstrained acts of independent powers, placing them under an obligation to do something which is not wrong;" Woolsey, *Int. L.*, 6 ed. (1897) 159. "The right of treaty is that whereby princes or peoples bind themselves for some more general purpose and with greater solemnity. For the definition of a treaty is, as Livy tells us, a contract which binds a whole people by the command of the supreme power; specifically it is, as Menippus says in Livy, a contract between those who are at peace with one another, in which those who have never been enemies join in friendship by a treaty of alliance;" Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. IV. See definitions collected in *Amer. J. Int. Law*, 538, n.

⁶ Crandall, *Treaties*, 2 ed. (1916) 5.

It has been supposed that by international law treaties must be in writing; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. II. II. 3 n.; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 78. The notion is without weight. The requirement in the municipal law is entirely owing to statute, and there are no statutes in international relations. There furthermore can be no such notion as the variation of a treaty by parol evidence. It has been stated that the terms of the treaty cannot be varied by verbal declarations or agreements made among the negotiators. No case has been cited raising any such question, and whatever rule there is simply arises from common sense and custom. Hall, *Int. Law*, 6 ed. (1909) 321, says that the moment "that consent on both sides is clearly established by whatever means, it may be shown a treaty exists, of which the obligatory force is complete."

⁶ Hershey, *Int. L.*, (1912) 314n¹⁰; Wilson, *Int. L.*, (1910) 195, 196.

⁷ Wilson & Tucker, *Int. L.*, (1901) 206. Each state will obviously insist that the official version is the one in its own language. This is a difficulty which cannot be removed until there is a universal tongue. See §200, ante, on language of diplomatic intercourse. 1919, June 28^a-Peace Treaty of Versailles, provided in Art. 440, as follows: "The present Treaty, of which the French and English texts are both authentic, shall be ratified."

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History

The choice of words and arrangement of parts is entirely in the discretion of the parties, although, as may be expected, the force of precedent imposes on treaties a certain formal aspect and arrangement.⁸ Treaties are furthermore made by the plenipotentiaries as principals purporting to act under full authority and not in the names of the monarchs or states who are the real parties to the treaties. The publicity to be given to the treaty is entirely a matter of the municipal law of the parties concerned.⁹

HISTORY OF TREATIES.

§342. The history of treaties is a part of the history of the relations between states, the principal incident in which is the change from the ancient feeling of hostility toward foreigners to the modern feeling of friendliness.¹⁰ In ancient times the alien was regarded as an enemy, and a state of more or less constant warfare existed between adjoining tribes.¹¹ The first treaties appear to have been for the purpose of suspending hostilities¹² and usually were for a certain time after which hostilities would be, as it were,¹³ automatically renewed. Other early forms of treaties were (A) an alliance for purposes of war and defense. (B) League of friendship, by which the members of the state parties became friends of each other¹⁴ and

⁸ For discussion of forms and examples, see Crandall, *Treaties*, 2 ed. (1916) 5 et seq., 635 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 550 et seq.; Wilson, *Int. L.*, (1910) 195-196¹¹; Wilson & Tucker, *Int. L.*, (1901) 203-205.

⁹ Secret treaties and secret articles in treaties have been very common in Europe. They are obviously inappropriate in modern times when the people assert their interest in international affairs, and accordingly the municipal law of some states is designed to prevent any negotiation of a secret treaty. In the United States of America, although a treaty is not valid unless ratified by the Senate, yet as the Senate has power to hold secret sessions, it might secretly ratify a treaty, the terms of which would be kept from the public and thus perpetrate one of the evils of unlimited monarchies. No case of any such action by the Senate has occurred.

¹⁰ See §427, post; Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. XV. V. 2.

¹¹ Ayala, *Law of War*, (1582) Carnegie Ed., I. VII.

¹² A truce was made between Louis XI. of France and Edward IV. of England, to continue in force for one hundred years after their deaths; 2 Ward, *Hist.*, (Dublin, 1795) 141. See as to truces Ayala, *Law of War*, (1582) Carnegie Ed., I. VII; Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. III. XIX.-XXIV.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 382, 383, 387; 2 Ward, *Hist.*, (Dublin, 1795) 141. See §770, post.

¹³ Woolsey, *Int. L.*, 6 ed. (1897) 257.

¹⁴ Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. XV. V. 3; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 382, 383, 387.

commercial relations encouraged. (C) Treaties relating to ecclesiastical matters.¹⁵

The growth of civilization and increase in the strength and extent of the current of international life have brought about relations between states calling for a great variety and number of treaties, which have had a very great influence on the development of international law, the exact extent of which cannot be traced in this treatise.¹⁶ The growth of democracy and limitation of the power of the monarch has had a profound influence on the treaty-making function and the subject matter of treaties between states. Among autocracies the personal interest of the king predominated, and treaties of marriage, exchange, sale, and settlement of their dominions were of frequent occurrence.¹ Now the interest of the people is of paramount importance, and treaties are between states in their corporate capacity, without much reference to the personal affairs of the head of the state.²

Formation of a Treaty.

PRELIMINARY.

§343. The formation of the treaty involves several topics of importance: (A) the capacity of the parties, (B) the state act of

¹⁵ 2 Ward, Hist., (Dublin, 1795) 141.

¹⁶ See §399, post, on law-making effect of treaties and §120, ante, on treaties as a source of international law.

¹ 2 Ward, Hist., (Dublin, 1795) 141.

² For bibliography of collections of treaties, see 1 Oppenheim, Int. L., 2 ed. (1912) 102, 103. For references to and discussions of treaties, see "The Treaties of 1785, 1799 and 1828 between the United States and Prussia," edited by James Brown Scott. Carnegie Endowment for International Peace (1918). The French and English texts of the three treaties are printed in parallel columns, followed by a collection of Federal decisions, opinions of the attorney-general, and diplomatic correspondence bearing upon their interpretation and application. Reviewed in 19 Col. Law Rev., 263. "The Great European Treaties of the Nineteenth

Century," (1918) Sir Augustus Oakes. See 13 Amer. J. Int. Law, 364. "Three Centuries of Treaties of Peace and their Teaching," (1918) Sir Walter G. F. Phillimore; Martens, G., Law of Nations, (1788) Cobbett's Trans. Appendix; Woolsey, Int. L., 6 ed. (1897) 423 et seq. "Collection of Treaties between Latin-American States," (1862) Calvo, in Spanish. Lee, "Source Book of English History," (1901) 3 ed. Treaties between United States of America and other powers, 1776-1909, are compiled by William M. Malloy in Senate Document No. 357, 61st Congress, 2nd Session, Government Printing Office (1910). "Les Grands Traités politiques, Recueil des principaux textes diplomatiques depuis 1815 — jusqu'à nos jours avec des commentaires et des notes," (1911) Pierre Albin. See 7 Amer. J. Int. Law, 426.

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Capacity of Parties

exercising the treaty-making function, (C) the means of reaching the agreement, that is, negotiation, (D) the actual execution of the treaty and its ratification. These correspond to somewhat similar topics in the municipal law of contracts, but there is considerable difference in principle which must be clearly understood. We shall discuss these headings in the order named.

Capacity of Parties.

PRELIMINARY.

§344. Is there any distinction to be drawn between states as to their capacity to enter into a treaty? Incapacity is physical, as insanity, and legal, as in the case of a married woman in the English common law. There is no question as to the physical capacity of a state,³ and the considerations of insanity and minority are inapplicable. In so far, however, as the international factors of conduct operate to restrain the exercise of the treaty-making function, there may be said to be a question of legal capacity. Several cases present themselves which are indicated in the note.⁴

INDEPENDENT STATES.

§345. Every independent state has full power, by virtue of its inherent force and existence as a living organism, to enter into a treaty.⁵ The power cannot depend on a grant from any external

³ See §60, ante, on personality of a state. See §68, ante, on continuity of a state.

⁴ (A) Independent states, which are to be divided into three classes: (a) those members of the family of nations, (b) those not members, and (c) those in either case where there is a paralysis of government. (B) Belligerent states. (C) Neutralized states. (D) Dependent states.

⁵ This is accurately apprehended by a number of writers, e. g., Crandall, *Treaties*, 2 ed. (1916) 1; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 543. Others, however, say that a state has a right to make a treaty without defining the

sense in which they use the word "right," and in which connection it can only mean a power, e. g., Martens, G., *Law of Nations*, (1788) Cobbett's Trans. IV. I. 5; Twiss, *L. of Nations*, Peace, 2 ed. (1884) 382 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part. I. IV. IV. Hall, *Int. Law*, 6 ed. (1909) 317, says that a state has power as a moral being to contract with another state to do or refrain from doing any act not forbidden by international law. Upon this it is to be observed that it has full power to do an unlawful act, and therefore this statement is unduly restricted. It might as well be said in the municipal

superior political power, because there is no such power in existence. If the government of an independent state is paralyzed or has disappeared by reason of anarchy or other internal cause, there is no political organization to represent the community of the people in international life, and consequently no government which can enter into a treaty. Such cases are not of frequent occurrence, and when they do occur are of short duration, and therefore practically immaterial in the course of international events.⁶ The incapacity, it will be observed, is not an incapacity of the state, but a temporary incapacity of the government.⁷ The notion entertained by some writers that the capacity of a state to make the treaty may be limited by its fundamental law⁸ arises from a failure to distinguish between the capacity of a state and capacity of the government which is its organ.

Down to the beginning of the nineteenth century, when the princes of Europe were the only recognized members of the family of nations, the notion was strongly entertained that a distinction was to be made as to treaties made with powers outside the membership. The snobbishness of kings cultivated the idea of the inferiority of states not members of the family of nations, and treaty obligations with such were regarded very much as the fashionable fop considers his tailor bill. Traces of this notion are still to be found in the writers. The practice of the international world has fully dissipated any idea that such treaties are unequal or of less obligation than others.⁹ The circle of the family of nations, furthermore, has so

law that a man has no power to commit murder because the political power of the state imposes a restraint on such an act.

⁶ Thus the state of anarchy in Russia (1919) seems to present a case where there is no government which can be definitely pointed out as representing the community. The same thing occurred during the French Revolution.

⁷ See §68, ante, on continuity of a state.

⁸ Wilson, *Int. L.*, (1910) 194.

⁹ For discussion of treaty relation of Russia and Turkey, 1774-1853, see Holland, *Studies* (1898) 201 et seq. "There are treaties of the Sultan with Austria, Venice, and Poland, in 1699;

with Austria in 1718 (the Peace of Passarowitz); and with Russia in 1774, 1792, 1812, 1826, 1829 and 1833. The United States and the maritime nations of Europe have treaties with China and Japan, and ministers resident at Peking and Yedo. The United States have treaties with China, of 1844 and 1858; and with Japan, of 1854 and 1858; with the Ottoman Empire, of 1830 and 1862; with Siam, of 1833 and 1858; with Algiers, of 1795, 1815, and 1816; Tripoli, of 1796 and 1805; Tunis, of 1799 and 1824; Persia, of 1856; the Sultan of Muscat, of 1833; Morocco, of 1836, and Borneo, of 1850;" Wheaton, *Elements*, Dana's ed. (1866) 22.

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Parties. Belligerent States

widened that today it includes all independent states¹⁰ of the world of any importance and treaties are freely made with the few independent ones still outside the charmed circle.

Treaties with non-Christian states were also distinguished.¹¹ The distinction in each of these two cases did not actually go to the length of maintaining that no treaty should be made, but only to the application of the principle that such treaties were not binding. The Christian princes of Europe did not hesitate to enter into treaties with the formidable Ottoman Porte whenever induced by force or self-interest, and made light of evading them whenever it was possible and advantageous. Questions of religion have now almost entirely disappeared from the conduct of state affairs, and the subject is therefore only of historical interest.¹²

BELLIGERENT STATES.

§346. In the case of a revolted or insurgent state, where the parent state has not recognized its independence, and there is some doubt as to whether it will ever become a state, a question will arise as to its capacity to make a treaty. In other parts of the discussion we have referred to the difficulties raised by this state of facts in connection with the questions of recognition,¹³ sending of envoys¹⁴ and transfer of state territory.¹⁵ The question as to a treaty will not often arise because such a state is not ordinarily in a position to make the treaty until it has established its independence, and while other states may recognize the independence or the belligerency of such a body, such recognition is not necessarily followed by the conclusion of a treaty. The making of a treaty with such a body is solely a question of discretion with the independent state concerned, and the parent state is the only party which can complain.¹

¹⁰ See §77, ante, on family of nations.

¹¹ Grotius, *Bellic. ac. Pacis* (1625), Whewell's Trans. II. XV. VIII-XII.; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 28, discusses the question whether treaties may be made with those who are strangers in religion.

¹² 1 Halleck, *Int. L.*, 4 ed. (1908) 294n; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 74; Vattel, (1758) Chitty's Trans. Book II. §162.

¹³ See §84, ante.

¹⁴ See §141, ante.

¹⁵ See §247, ante.

¹ 1641, Great Britain entered into a treaty with Portugal, then revolted from Spain; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 28. See Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 12. In 1778, France, and in 1782, the United Netherlands, respectively, made treaties with revolted American colonies.

ABSOLUTE GOVERNMENTS.

§351. The treaty-making power was the personal prerogative of the monarch as head of the state because he embodied in his own person all the functions of state, particularly the international functions. It was exercised by him for such purposes as he saw fit, and mostly with an eye to his own profit and little regard for the interests of the people. A few cases are referred to in the note where the monarch himself signed the treaty.⁷ With the growth of limited governments, the position of the monarch has disappeared.

LIMITED GOVERNMENTS.

§352. In democracies and limited monarchies the representatives of the people as determined by the municipal constitution, participate in the exercise of the function.⁸ Where, as in some cases, several

⁷ 1676, Feb. 26, Charles II. personally transcribed, signed, and sealed with his own hand a secret treaty with Louis XIV.; 3 Hill, *History of Diplomacy* (1905) 143. "Napoleon III. of France and Francis Joseph of Austria met in person at Villafranca July 11, 1859, and agreed upon preliminary articles of peace." * * * "The articles of the Holy Alliance of September 26, 1815, were signed in person by the Emperors of Austria and Russia and the King of Prussia. The treaties concluded at Tilsit July 7, 1807, between Napoleon and Emperor Alexander were not signed by the monarchs but embodied the results of their previous personal conferences upon the river Niemen;" Crandall, *Treaties*, 2 ed. (1916) 1. See §134, ante, on personal negotiations of monarchs.

⁸ As to municipal law of the several independent states, see Austria Hungary; Crandall, *Treaties*, 2 ed. (1916) 327. Belgium; Ibid. 315. Bulgaria; Ibid. 336. Denmark; Ibid. 331. France; By Art. 8 of the Constitution, "the President exercises the treaty-making power, but peace treaties and such other treaties as concern com-

merce, finance, and some other matters, are not valid without the co-operation of the French Parliament;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 546; Crandall, *Treaties*, 2 ed. (1916) 301-314. Greece; Ibid. 335. Germany; By Articles 1, 4 and 11 of the Constitution, the Emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce and several other matters, are not valid without the assent of the Bundesrath and Reichstag; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 546. See Crandall, *Treaties*, 2 ed. (1916) 323-327. Italy; Ibid. 320. Japan; Ibid. 336. Luxemburg; Ibid. 317. Mexico; Crandall, *Treaties*, 2 ed. (1916) 337. Montenegro; Ibid. 335, 336. Netherlands; Ibid. 317. Norway; Ibid. 330. Portugal; Ibid. 333. Roumania; Crandall, *Treaties*, 2 ed. (1916) 335. Russia; Ibid. 336. Sweden; Ibid. 329. Spain; Ibid. 332. Switzerland; Ibid. 333. Serbia; Crandall, *Treaties*, 2 ed. (1916) 335. Turkey; Ibid. 337. Great Britain; The power to conclude treaties is a prerogative of the Crown exercised on advice of a responsible ministry; Crandall, *Treaties*, 2 ed. (1916) 279 et seq. United

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Negotiation

different branches of the government have a hand in the matter, a certain amount of delay and difficulty will sometimes inevitably occur. The primary function of forming the treaty is usually vested in the chief executive or head of the state, who generally conducts negotiations through officers of state or envoys, and then either ratifies the treaty himself or submits the treaty as agreed upon to the organ of the state having power of ratification or participation in the ratification. We have therefore to consider negotiation and ratification.

NEGOTIATION.

§353. The terms of the treaty are arrived at by negotiation between the states concerned, which negotiations may be carried on by the head of the state directly, by other officers of the state thereto appointed by law, or diplomatic agents appointed for the purpose.⁹ Direct negotiation by the head of the state is usually impossible and rarely occurs in practice.¹⁰ The usual custom is to

States of America: Articles of Confederation (1777): Article IX. "The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." See Crandall, *Treaties*, 2 ed. (1916) 24-42. Federal Constitution of 1787: The power is exercised by the President by and with the consent of the Senate. "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Art. II. Sec. 2, Cl. 2, Constitution of the United States. See 5 Moore, *Dig. of Int. L.*, (1906) 156-221; *Insurance Co. v. 356 Bales of Coffee*. 1 Pet. 511 (1828); Crandall,

Treaties, 2 ed. (1916) 43 et seq. "The Extent and Limitations of the Treaty-making Power under the Constitution," Chandler P. Anderson; 1 *Amer. J. Int. Law*, 636 et seq. "The Supreme Court and the Treaty-making Power," Henry St. George Tucker; *Georgia Bar Assn.* (1917) 86. "The Japanese School Question and the Treaty-making Power," Amos S. Hershey; 1 *Am. Pol. Sci. Review*, 393 et seq. "The Treaty-making Power of the United States and the methods of its enforcement as affecting the police power of the States," Charles H. Burr, *American Philosophical Society* (1912). "Treaties. Limitations of the Treaty-making Power," James Harrington Boyd; 86 *Cent. Law. J.*, 172 et seq., 188 et seq. "The Treaty-making Power and the Reserved Sovereignty of the States," Arthur K. Kuhn; 7 *Col. Law. Rev.*, 172 et seq.

⁹ See §143, ante, on organs of state intercourse. See §147, ante, on functions of head of state.

¹⁰ See §351n³, ante, on head of state as organ of intercourse.

empower negotiators. The Secretary of State or Foreign Minister usually supervises the action of the negotiators and acts as an intermediary between the government and the diplomatic officers.¹¹ The officials for negotiation have the powers conferred by the state sending them, generally expressed in a written document.¹² When the agents meet, the powers are exhibited, and sometimes a representative will refuse to go on with the negotiations if the powers conferred on the other party are not satisfactory.¹³ While an envoy, as we have pointed out, is not an agent as such, he may be considered as an agent when sent to negotiate a particular treaty.¹⁴ It is usual to appoint special envoys to negotiate treaties of importance, particularly treaties of peace, etc., although treaties are often negotiated by the regular diplomatic officers.

THE EXECUTION OF THE TREATY.

§354. When the negotiations are complete and the treaty as agreed upon has been drawn up and written, the next step obviously is its execution. The practice was for the negotiators to express the treaty as being concluded between them as envoys acting under full power, and to sign it as principals. On its face, therefore, the treaty was complete upon such execution, and nothing further was required to fix the document upon the parties as the state act of each. Had the treaty been expressed as being between the monarchs alone, then they would have executed the writing, and by so doing, have ratified that which their agents had done, but not the treaty, which would have come into existence as a document only when so

¹¹ "The negotiation of treaties includes (1) the international agreement upon the terms, (b) the drafting of the treaty, (c) the signing, and (d) the ratification;" Wilson & Tucker, *Int. L.*, (1901) 202.

¹² See §157, ante, on credentials of an envoy.

¹³ See cases cited; Crandall, *Treaties*, 2 ed. (1916) 2, 3.

¹⁴ See §152-193, ante, on ambassadors. See §143, ante, on organs of intercourse. In the United States of America, the negotiation is generally conducted by the Secretary of State. Indian treaties were negotiated by special commissioners acting for the

President under the War Department until control of Indian affairs was transferred to the Department of State. These treaties were filed with the Department of State. No Indian treaties have been made since the Act of March 3, 1871, which forbade further recognition of Indian tribes or nations as independent powers. Postal Conventions, since the Act of June 8, 1872, are negotiated and made by the Postmaster General. As to negotiations by the United States, see 5 Moore, *Dig. of Int. L.*, (1906) 179-184. The President of the United States, however, negotiated in person the Peace Treaty of Versailles of June 28, 1919.

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executed. The distance which generally separated the parties and consequent delays probably dictated the former practice which is continued at the present time by limited governments and democracies. This peculiar form of document which was used gave rise to the difficulties over ratification which will next be discussed.

Ratification.

PRELIMINARY AND DEFINITION.

§355. Ratification is the act by which a state government signifies its approval of the treaty which has been executed by its negotiators. A few definitions are collected in the note.¹⁵ Ratification has been much discussed by the writers, but their opinions are conflicting and obscure, an obscurity which prevails more in theory than it does in practice. We shall discuss the history of the subject first.

HISTORY OF RATIFICATION.

§356. An absolute monarch was the state in theory and in fact, and his personal assent was all that was necessary to the completion of a treaty. In the rare cases where monarchs dealt with each other in person, the case would in fact be just like that of two individuals making a contract in municipal life. The envoys were invested with full powers to negotiate and conclude a treaty out of consideration of the importance of the business, the high position of the parties, and respect to the other monarchs with whose agents they were

¹⁵ "Ratification is a formal ceremony, whereby, sometime after a treaty has been signed, solemn confirmations of it are exchanged by the contracting parties;" Lawrence, *Int. Law*, 5 ed. (1913) 324. This is a definition of exchange of ratification, not of ratification itself. "Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 553. As to the form of ratification, see Crandall, *Treaties*, 2 ed. (1916) 635 et seq.; Hall, *Int. Law*, 6 ed. (1909) 326. Ratification may be tacit or express; Hall, *Int. Law*, 6 ed. (1909)

322. "Ratification is the act by which the treaty-making power approves and confirms that which has been agreed upon by its authorized agent or agents;" Wilson, *Int. L.*, (1910) 197. The treaty as agreed upon before ratification is generally called the draft of the treaty; Wilson & Tucker, *Int. L.*, (1901) 203. For methods and procedure of ratification in foreign countries and extracts from the executive journal of the United States Senate relative to proceedings in case of treaties rejected by the Senate, see Senate Document No. 26, 66th Congress of the United States of America, 1st session.

engaged. On its face, therefore, the document was the act of the monarch and nothing further was necessary to complete it.¹⁶ The practice, nevertheless, was to exchange ratifications principally because of mutual distrust and the small faith which the parties had in each other.¹⁷ The ratification was practically only a notification of the intention of the prince to be bound and was perhaps part of the elaborate devices used to add binding force to a treaty.¹⁸ The universal prevalence of this practice of ratification has led the writers to state that ratification is obligatory, and that the treaty is not valid without it.¹⁹

The prince was left somewhat at the mercy of his agents, who might play him false or conclude a treaty not to his liking. Notwithstanding this, the opinion was sometimes advanced that he was bound by their acts, and that he was obliged to select them at his peril, a rule which was not without its practical advan-

¹⁶ See §354, ante.

¹⁷ "Ratification seems to have been usual in practice. One of the earliest recorded examples of this practice was in the treaty of peace concluded, in 561, by the Roman Emperor Justinian with Cosroes, I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, *Histoire des Anciens Traites*, Partie II. p. 295;" Wheaton, *Elements*, Dana's ed. (1866) 333nb. The Convention of July 15, 1840, between Austria, Great Britain, Russia, Prussia and Turkey, relating to the Ottoman Empire, provided that the preliminary engagements should take effect immediately without waiting for exchange of ratifications. Wheaton, *Elements*, Dana's ed. (1866) 337, cites this as a case where ratification was expressly dispensed with. Hall, *Int. Law*, 6 ed. (1909) 325, however, says that the envoys who signed the treaty, unless acting under a previous enabling agreement, had no authority to dispense with ratification, and that the treaty

was properly a provisional one, which, when carried into effect, received tacit ratification by execution of its provisions.

¹⁸ If, therefore, ratification was a matter of course, refusal to ratify was in theory a preliminary breach of the articles of the treaty, see §367, post.

¹⁹ Hall, *Int. Law*, 6 ed. (1909) 323-325, says that ratification by a state is necessary to the validity of a treaty, which ratification in strict law may always be withheld, but morally or legally cannot be arbitrarily withheld, but a state must be left to its own discretion, subject to restraints imposed by its own sense of honor and risk of wanton refusal, but that above rule of moral obligation or ratification cannot be applied to a state like the United States, where ratification is required by the municipal law. Hershey, *Int. L.*, (1912) 315, says, that while some maintain that a state is morally bound to ratify, he knows of none who maintains that it is legally bound. See Hershey, *Int. L.*, (1912) 315n¹⁵; Lawrence, *Int. Law*, 5 ed. (1913) 324, 325; Wilson & Tucker, *Int. L.*, (1901) 207.

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tages.³⁰ The idea was then advanced that where the ambassador had acted in compliance with his instructions, secret or public, the prince was bound to ratify, but where the ambassador had exceeded or violated his instructions, the prince might delay or refuse ratification.¹ Another opinion was that full powers given to an envoy, although absolute on their face, were subject to an understood qualification that the prince could refuse for sufficient reason to ratify the treaty agreed upon. Another notion was that the treaty is binding except where the envoy has exceeded his full patent power, and ratification is only necessary in the case where it is expressly reserved in the full powers or stipulated in the treaty itself.

Some writers speak of a right of ratification,² and others of a right of refusing it without indicating the sense in which the word "right" is used. They probably mean power by right. Necessity of ratification may mean that the ratification is necessary from the municipal point of view before the treaty is the obligation of the state, or, from an international point of view, that it is necessary before the other state can consider the treaty as being executed.³

³⁰ Grotius, Puffendorf, cited Wheaton, *Elements*, Dana's ed. (1866) 330, 331. For a discussion in the 17th century over the question of whether a treaty should be regarded as being in force before being ratified by the Queen of Sweden, see Vreeland, Grotius (1917) 195-197.

¹ Wheaton, *Elements*, Dana's ed. (1866) 330, 331. "But, before a prince can honorably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minister has deviated from his instructions;" Vattel, (1758) Chitty's Trans. Book II. §156. See Hall, *Int. Law*, 6 ed. (1909) 323.

² Crandall, *Treaties*, 2 ed. (1916) 2, says: "The advantage of entrusting full and general powers to the negotiators, and the importance of the trust have led recent writers quite generally to admit the right of ratification, even if no express reservation be made in the

treaty of full powers." If there is any so-called right reserved, it is a right of refusing to be bound by the treaty. The ratification is a necessity, and the only question is whether it may be refused. The conclusion does not follow. What he probably means is that the state reserves the power of refusing to be bound.

³ 1841—The King of Holland refused to ratify a commercial treaty he had concluded as Grand Duke of Luxemburg on the ground that since he had signed it he had become convinced that it would injure the trade of his subjects. 1844—Great Britain dropped an agreement she had concluded in 1833 with Portugal concerning the mouth of the Congo, the reasons being that its provisions were very far from satisfying the traders and others immediately concerned, and that it was proposed to settle the question, along with many other similar ones, at a great international conference; Lawrence, *Int. Law*, 5 ed. (1913) 325.

RATIFICATION—LIMITED GOVERNMENTS.

§357. When the government is limited and the people have a voice in the determination of their own affairs, it is absolutely out of the question for the executive or any agents appointed by him to bind the government or the state.⁴ The unlimited agents of the monarch are replaced by the limited agents of modern governments, the powers of which, however, are usually expressed to be exercised subject to ratification by the state sending them.⁵ Many writers still continue to discuss the question of when a ratification may be refused. Necessity of ratification is now apparent, as we would say at the bar, on the face of the record.

⁴ Lawrence, *Int. Law*, 5 ed. (1913) 324, 325, says that where the treaty-making power is by municipal law vested in different organs of government, there is not the slightest obligation to ratify, as all states must know that the approval of two bodies is necessary, but that where the powers are in one hand some reason should be forthcoming to justify refusal to ratify. "It is now the practice to make an express reservation of the right of ratification either in the full powers given the negotiators or in the treaty itself;" Hall, *Int. Law*, 6 ed. (1909) 325. See provisions of the Peace Treaty of Versailles of June 28, 1919, quoted in §400, n. 6, post. To say, as Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 554, does, that the institution of ratification is a necessity for international law, is to overlook the question. What the learned professor probably means is that ratification is a necessary precaution to be insisted upon by the municipal law of each state in order to avoid undue haste in making treaties.

⁵ Organs for ratification by municipal law: United States of America—The United States Senate, see 1 Willoughby *Constitutional Law*, (1910) 462, n. 14, and for United States practice, see 5 Moore, *Dig. of Int. L.*, (1906) 184–310; Wheaton, *Elements*, Dana's ed. (1866) 338. Crandall, *Treaties*, 2 ed. (1916)

2, says that in the United States of America the negotiators are appointed and instructed by the President alone therefore they represent only a separate organ of the government, and not the organs which concur to exercise the treaty power, and consequently no such appointee can bind the state. The question of ratification in the United States of America appears to be fully covered by the Constitutional provision. The Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India. The Governor General of Turkestan has similar powers for the Emperor of Russia; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 558. "In England the Sovereign can make a treaty without consulting parliament, as of necessity, though it is customary to acquaint parliament with the fact of such negotiation having been completed, and in some cases—especially if money be needed to carry it into effect—the treaty is laid on the tables of the two Houses before it is ratified;" Manning, *Int. L.*, 2 ed. Amos. (1875) 128. See 2 Phillimore, *Int. L.*, 3 ed. (1879–1888) 79n². The Peace Treaty of Versailles of June 28, 1919, was laid before parliament and the necessary legislation enacted to carry it into effect.

LIMITED OR PARTIAL RATIFICATION.

§358. It is only necessary now to notice that if the treaty is ratified in part or with modifications, there is no agreement, and the negotiations must be renewed, or, as it is clumsily expressed by the writers, a treaty cannot be ratified in part. This ratification may be made with reservations upon the understanding that terms shall be understood in a certain way. The time of ratification is usually fixed in the agreement of the negotiators, and each party given a certain time within which to ratify it, failing which the treaty, as it is said, falls to the ground.⁶

⁶ The commercial treaty of Utrecht between Great Britain and France was never carried into effect, as the British Parliament refused to pass the necessary legislation; 1 Halleck, *Int. L.*, 4 ed. (1908) 299. France refused to appropriate money to carry into effect the convention with the United States of America of 1831; 1 Halleck, *Int. L.*, 4 ed. (1908) 300. In 1841, the French Government refused in consequence of the opposition of the Chambers to ratify a treaty made for the suppression of the slave trade; Hall, *Int. Law*, 6 ed. (1909) 324. The United States Senate ratified with modifications the treaty made with Great Britain in 1824 with respect to the mutual right of search; 1 Halleck, *Int. L.*, 4 ed. (1908) 301. The Hay-Pauncefote Treaty of February 5, 1900, was ratified with modifications by the United States Senate on December 20, 1900, by which the treaty fell to the ground, Great Britain refusing to accept the modifications; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 557, 559. Hall, *Int. Law*, 6 ed. (1909) 326n², says that such a case is not a ratification but a new treaty, that the word "ratification" is a misnomer under which refusal of ratification is disguised. The distinction is immaterial. 1868, Treaty of Oct. 24, between United States and Denmark for sale to the United States of the Danish West

Indies, after ratification by Rigsdag of Denmark, was submitted to the United States and ratification refused. 1902, Treaty of January 24, between the same parties for the same purpose was ratified by United States Senate but approved only by one house of the Danish Rigsdag, thereby failing of ratification. Lorimer, *Inst.* (1883-4) Vol. 1, 266, 267, refers to the dissatisfaction felt in Great Britain with the results of the Treaty of Washington, and of the movement in the British Parliament on March 3, 1873, to abrogate the treaty, raising thereby the question whether the state government represents the national will in negotiating a treaty and the capacity of the people to refuse a ratification of the performance. There is no doubt that as the state is a living organism and the government an organ thereof, that the individual members may disaffirm what the government has done. This is a mere question of ratification raised by the existence of limited governments and not obtaining among autocracies. Ratifications of general conventions are sometimes made with reservations. E. g.—France of Anti-slavery Conference of July 2, 1900; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 566. The question as to retroactive effect of ratification has caused a considerable difference of opinion. Hershey, *Int. L.*, (1912) 314,

CARTELS, CAPITULATIONS, TRUCES—RATIFICATION OF.

§359. It has been supposed that there is no necessity for ratification unless it is expressly reserved, in the case of cartels, truces, capitulations and the like, since they are concluded in the exercise of a general implied power confided to certain public agents as incidental to their official duties. This distinction, it is believed, is unsound, because the state may disavow the action of the agent, and no doubt in any such case the agreement made by him is submitted to some kind of examination and approval at headquarters. The fact is that such agreements are rarely interfered with,** as the circumstances are so obvious, and ordinarily the officer will be in receipt of some instructions covering the matter before he makes the agreement.⁷

CONFIRMATION OF TREATIES.

§360. It has been the practice in the international world for states when entering into treaties to confirm earlier treaties, a practice resorted to frequently during the period of absolute governments when treaties related to the various pretensions and territorial positions of the reigning houses which were constantly being upset by the turmoil of the powers. Every prince, therefore, who had any advantage sought to have that confirmed by each succeeding treaty entered into by the other parties.

Classification and Names of Treaties.

PRELIMINARY.

§361. The classification of treaties is involved in great obscurity, each writer apparently adopting his own ideas without much reference to those entertained by others or to a logical analysis of the

says partial or conditional ratification is not permissible, by which he probably means that such a ratification is of no effect unless the changed terms are agreed to by the other parties to the treaty.

* See cases cited §771, post.

⁷ See Ayala, *Law of War*, (1582) Carnegie ed., I. VII; Grotius, *Belii. ac. Pacis*

(1625), Whewell's *Trans.* III. XXII; Vattel, (1758) Chitty's *Trans.* Book III. §§ 237, 261, 262; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 42. See §769 et seq., post, on suspension of hostilities. See §770, post, on truces. See §772, post, on capitulations. See §771, post, on armistices.

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Classification

subject.⁸ We have therefore to thread our way through a maze of words, many of which will have no value to the international lawyer. Some of these terms are technical, indicating the kind of a treaty, irrespective of its object; others designate the object or purpose of the treaty, as to which no classification can be exhaustive. A few of the classifications of the writers are referred to in the note.⁹

⁸ "All attempts at classification of treaties seem to have failed"; Hall, *Int. Law*, 6 ed. (1909) 353n¹; Hershey, *Int. L.*, (1912) 311; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 541.

⁹ Pradier Fodere, II. Nos. 920, ff. (quoted in Hershey, *Int. L.*, (1912) 311n²) divides treaties as follows: General treaties: treaties of peace, political union, alliance, guarantee and protection, neutrality, cession, commerce, customs and unions. Special treaties: concordats, boundary treaties, treaties establishing servitudes, treaties of navigation, consular conventions and capitulations, conventions relating to literary and artistic property, industrial property, extradition treaties, postal, and telegraphic conventions, and conventions relating to railroads. Hershey, *Int. L.*, (1912) 311n², divides treaties into executed or executory, transitory or continuing, dispositive or permanent; and, on p. 312, into simple or conditional, unilateral or bilateral, preliminary or definitive, accessory, additional, subsidiary or principal. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 541, divides treaties into law-making and treaties concluded for all kinds of other purposes. See Hall, *Int. Law*, 6 ed. (1909) 353n¹, for review of the classifications of some of the authors. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 70 et seq., considers treaties: (1) As to the subject, whether they relate to a matter of natural right or whether they contain some obligation as to what was previously indifferent. (2) With respect to their object. (3) With respect to the contracting parties, whether they are: (a) Both Christian; (b) Christian and infidel; (c) Christian and Mohammedan; (d) Within or without Europe. (4) With respect to the time in which contracted. (a) Whether before or after the Treaty of Westphalia (1648); (b) Whether before or after the Treaty of Utrecht (1713); (c) Whether before or after the period of the Treaty of Utrecht to the outbreak of the French Revolution (1791); (d) Whether during twenty-five years of the Napoleonic Wars; (e) Whether between that period and the present (1882). (5) Certain international engagements, as contracts between the State and a private individual of another country, and contracts relating to the private affairs of the sovereign are not treaties. (6) Treaties also to be considered with respect to their occasion and object. Wheaton, *Elements*, Dana's ed. (1866) 340, says: "General compact between nations may be divided into what are called transitory conventions, and treaties, properly so termed," that the first are perpetual in their nature, so that once being carried into effect, they subsist, independent of any change in the sovereignty, and although their operation is suspended during war, they revive on return of peace, e. g., treaties of cession, boundary, exchange of territory. Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. XV. V., followed by Vattel, (1758) Chitty's *Trans.* Book II. §169, divides treaties into (1) those which turn merely on things to which the parties were already bound by the law of nature; (2) those by which they enter into further engagements. Hall,

NAMES AND KINDS OF TREATIES.

§362. The names and kinds of treaties usually referred to are as follows: Acts,¹⁰ Alliance,¹¹ Amity and Friendship,¹² Arbitration,¹³ Arrangements,¹⁴ Armistice,¹⁵ Association,¹⁶ Auxiliary,¹⁷ Boundary,¹⁸ Capitulations,¹⁹ Cartels,²⁰ Cession,¹⁸ Commerce,²¹ Concordats,²² Confederation,²³ Conventions,²⁴ Declarations,²⁵ Defensive,²⁶ Dispositive,²⁷ Equal,²⁸ Extradition,²⁹ General,³⁰ Guarantee,³¹ Jurisdiction,³² Law-making,³³ Leagues,³⁴ Marriage,³⁵ Memoranda—Memoires,³⁶ Military,³⁷ Modus-Vivendi,³⁸ Navigation,³¹ Neutrality,⁴⁰ Pactum de Contrahendo,⁴¹ Parol,⁴² Peace,⁴³ Personal,⁴⁴ Preliminary,⁴⁵ Private,⁴⁶ Protection,⁴⁷ Protocol,⁴⁸ Public,⁴⁹ Punctationes,⁵⁰ Real,⁴⁴ Recognition,⁵¹ Renunciation,⁵² Sale,⁵³ Secret,⁵⁴ Special,⁵⁵ Sponsions,⁵⁶ Subsidy,⁵⁷ Succor,⁵⁸ Transitory,²⁷ Truce,⁵⁹ Unequal,²⁸ Warlike.³⁷ Some of the terms are self-explanatory, some are discussed further in the notes, and many of them are referred to in more detail at other parts of the discussion.

Int. Law, 6 ed. (1909) 317n¹, says: "Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are: (1) Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church. (2) Treaties, of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state. (3) Agreement with private individuals, e. g., for a loan. (4) Arrangements between different branches of reigning houses, or between the reigning families of different states, with reference to questions of succession and like mat-

ters." Roman civilians divided all international contracts into three classes: pactiones, sponsiones and foedera. See Wheaton, *Elements*, Dana's ed. (1866) 329na. "The compacts which have temporary matters for their object are called agreements, conventions and pactiones;" Vattel, (1758) Chitty's Trans. Book II. §153. Wilson & Tucker, *Int. L.*, (1901) 210 et seq., classify as follows: (1) As regards form. (a) Transitory; (b) Permanent or perpetual. (2) As regards nature. (a) Personal, relating to the sovereign; (b) Real, relating to things and not dependent on the sovereign. (3) As regards effects. (a) Equal; (b) Unequal; or (c) Simple or conditional; (d) Definite or preliminary; (e) Principal or accessory. (4) As regards objects. (a) General; (b) Special.

¹⁰ Acts: The term "act" was applied to the various paragraphs of the provisions of the treaty of Vienna, and has been applied in a similar provision in other general treaties. The term,

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however, seems to be of little application and had best be discarded.

¹¹ Alliance: "Treaties of alliance are, on the contrary, usually entered into for the purpose of common security and general defence, but without reference to any particular power or to any special event;" 1 Halleck, *Int. L.*, 4 ed. (1908) 305, 306. See Wheaton, *Elements*, Dana's ed. (1866) 355, 364. They have also been divided into real and personal alliance, equal and unequal, general and special, defensive and offensive. See Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. XV. VI. 3; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 595; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 424, 428; 1 Wildman, *Int. L.*, (1849) 164-168; Woolsey, *Int. L.*, 6 ed. (1897) 164. "Agreements of states to act together for specific or general objects constitute treaties of alliance;" Wilson & Tucker, *Int. L.*, (1901) 212.

¹² Amity and Friendship: Ancient name for treaties providing simply for mutual intercourse and friendship; 1 Halleck, *Int. L.*, 4 ed. (1908) 306.

¹³ Arbitration: Treaty of arbitration is one made for the purpose of referring a dispute between the parties to the decision of one or more third persons. "General Arbitration Treaties," Richard Olney; 6 *Amer. J. Int. Law*, 595 et seq. See §545, post, on arbitration.

¹⁴ Arrangements: "An agreement, an arrangement or a *modus vivendi*, usually prescribes in detail the line of conduct which will be followed in interstate relations under certain conditions;" Wilson, *Int. L.*, (1910) 192. E. g.—Between United States and Great Britain relative to naval forces to be maintained on the Great Lakes; Wilson, *Int. L.*, (1910) 193.

¹⁵ Armistice: An armistice is defined by Paulus as an agreement for a short and for the present time that combatants will not attack one another; Vasso calls it "the peace of a camp" or "the

holiday of war;" Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 3. An armistice differs from a truce in that in an armistice there is not only a cessation of hostilities but an agreement between the parties as to certain points. It is more in the nature of a local treaty between the commanders of the opposing forces entered into for the purpose of suspending hostilities. See §769 et seq., post, on suspension of hostilities and see §771, post, on armistices.

¹⁶ Association: "Treaties of association are usually made for the purpose of war, two or more States associating themselves together for the purpose of carrying on joint operations against a common enemy;" 1 Halleck, *Int. L.*, 4 ed. (1908) 305.

¹⁷ Auxiliary Treaties for limited assistance in war; 2 Ward, *Hist.*, (Dublin, 1795) 174-176.

¹⁸ Boundary, Cession: Boundary and cession treaties are those providing for a boundary between two or more states or calling for a cession of state territory. Discussed, Crandall, *Treaties*, 2 ed. (1916) 200 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 307; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 417; 1 Wildman, *Int. L.*, (1849) 159.

¹⁹ Capitulation: "A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other, besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes;" Hall, *Int. Law*, 6 ed. (1909) 547. "A capitulation is an agreement for the delivery of a besieged place or forces divided in the field into the hands of the enemy;" Maine, *Int. L.*, (1888) 188. See §772, post, on capitulations.

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³⁰ Cartels: "Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out;" Hall, *Int. Law*, 6 ed. (1909) 545-546. "Of the nature of treaties are cartels, which are agreements made between belligerents, usually mutual, regulating intercourse during war;" Wilson & Tucker, *Int. L.*, (1901) 201. "Cartels are agreements concluded between belligerents in regard to intercourse in time of war;" Wilson, *Int. L.*, (1910) 192. "Cartels are agreements between belligerents for the purpose of regulating permitted intercourse in time of war, particularly the exchange and treatment of prisoners;" Wilson, *Int. L.*, (1910) 362. "A cartel is an engagement for the exchange of prisoners of war;" Maine, *Int. L.*, (1888) 190. See §769, post, on suspension of hostilities. See §762, post, on exchange of prisoners.

³¹ Commerce: Treaties of commerce are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse; 1 Halleck, *Int. L.*, 4 ed. (1908) 306; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 612; 2 Ward, *Hist.*, (Dublin, 1795) 202; 1 Wildman, *Int. L.*, (1849) 168. Commerce and Navigation: Twiss, *L. of Nations, Peace*, 2 ed. (1884) 398-402; 1 Wildman, *Int. L.*, (1849) 168.

³² Concordat: A concordat is an agreement between the Pope and an independent state concerning the affairs of the Church in such independent state. These are now only entered into by Catholic states. See 1 Halleck, *Int. L.*, 4 ed. (1908) 302n². For further discussion of concordats, see 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 427 et seq.

³³ Confederation: Treaties of confederation are usually made for the purpose of forming a union more or less close in reference to certain special objects with respect to internal or external matters; 1 Halleck, *Int. L.*, 4 ed. (1908) 305. Confederations are treaties for forming a new state as German State, Swiss Confederation, Teutonic and Hanseatic Leagues; 2 Ward, *Hist.*, (Dublin, 1795) 163-174; Woolsey, *Int. L.*, 6 ed. (1897) 165, 166. See §365, post, on treaty distinguished from a federal constitution.

³⁴ Convention: The term is indiscriminately applied to treaties but perhaps more usually to the various subdivisions of the general rules adopted at international congresses. Thus, the important rules adopted at the First and Second Peace Conferences at the Hague are called "Conventions;" so also the result of the deliberations at the Red Cross Congress at Geneva. "The terms 'treaty and convention' are practically synonymous, although the latter term is probably applied more frequently to treaties of lesser importance;" Hershey, *Int. L.*, (1912) 311n. Convention less broad than a treaty, and usually applied to some specific object; Wilson & Tucker, *Int. L.*, (1901) 199. For illustration of the confusion in the use of the words "treaty" and "convention," see Crandall, *Treaties*, 2 ed. (1916) 7n¹⁹. "Convention is the usual term given to agreements in regard to consular relations, naturalization, extradition, postal relations, and the like;" Wilson, *Int. L.*, (1910) 192. "The terms are synonymous and even the usage of calling the more important acts treaties and the less important ones conventions, is far from being uniformly followed;" 1 Westlake, *Int. L.*, 2 ed. (1910) 290. "A convention usually relates to some specific subjects, rather than to matters of general character, as

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in the case of a treaty;" Wilson, *Int. L.*, (1910) 192. Used by Grotius, *Belli ac. Pacis* (1625), Whewell's *Trans. II. XV.*; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 3.

²⁶ Declaration: A declaration, properly speaking, is a unilateral act setting forth the intention or resolution of the party signing it, and has no binding validity unless accepted or adopted by some other party, and does not from its form necessarily contemplate such adoption as in the case of a contract. The results of several important conferences of international delegations have been designated as declarations. Thus, the Declaration of St. Petersburg, in 1856; Declaration of London, in 1909. The contents of such declarations are not to be distinguished on principle from those containing the convention laid down at the Hague, and there really seems to be no reason why the word "declaration" should be used any longer, though its meaning as to these particular treaties has become fixed. "Declarations are usually documents containing the reciprocal agreements of states, as in granting privileges in matters of trademarks . . . to the citizens of each state. The term is used for the documents which (1) outline the policy of course of conduct which one or more states propose to pursue under certain circumstances; (2) which enunciate the principles adopted; (3) which set forth the reasons justifying a given act;" Wilson & Tucker, *Int. L.*, (1901) 200. "Declarations are usually in the form of reciprocal agreements, relating to the rights and privileges of the nationals of the states. The term 'declaration' is also applied to the formal statement of the principles in accord with which states propose to act, or to the formal statement of the grounds for an action;" Wilson, *Int. L.*, (1910) 192.

²⁸ "Defensive treaties, as generally

understood, are made to secure the parties to them against aggression from other states;" Woolsey, *Int. L.*, 6 ed. (1897) 164.

²⁷ Dispositive or Transitory: A transitory or dispositive treaty is one "which disposes of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating a right of way over it in the grantee;" 1 Westlake, *Int. L.*, 2 ed. (1910) 60, 61. Such are treaties of cession. Continuing, the same author says that they are so called because their effect passes over into and forms part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact without being always obliged to refer to the dealings which created it. He admits the term is bad because the word "transitory" does not suggest permanency, yet the operation of the treaty is usually most permanent, and the best word is dispositive. In plain English, what all this means is that some treaties call for immediate performance, and when that is done the treaty is executed—*functus officio*—and we have only to deal with an altered state of facts resulting from the performance. In the simple language of the municipal law, the treaty is fully executed. See also 1 Westlake, *Int. L.*, 2 ed. (1910) 294; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 418.

²⁸ Equal and Unequal: "Equal treaties are where the contracting parties promise the same or equivalent things; and unequal treaties are where the things promised are neither the same nor equitably proportioned;" 1 Halleck, *Int. L.*, 4 ed. (1908) 304. See Vattel, (1758) Chitty's *Trans. Book II. §172*. Sometimes spoken of as bilateral or

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unilateral. To be distinguished from equal and unequal alliances, which distinction relates to the dignity or rank of the states concerned; 1 Halleck, *Int. L.*, 4 ed. (1908) 304. "Treaties are either equal, when princes or peoples are under a like obligation, or unequal, when one is bound to do more than the other;" Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. IV.; Grotius, *Belli. ac. Pacis* (1625), Whewell's Trans. II. XV. VI. VII.; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 386, 424-428.

²⁹ Extradition, *Treaties of*: Crandall, *Treaties*, 2 ed. (1916) 230; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 405 et seq. See §462, post, on extradition.

³⁰ General: *Treaties containing general provisions or applying to or entered into by many states.*

³¹ "Guarantee: . . . is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights, by a third power;" Wheaton, *Elements*, Dana's ed. (1866) 354. "Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations;" Hall, *Int. Law*, 6 ed. (1909) 334. "Treaties of guaranty are agreements through which one or more powers engage to maintain given conditions or rights;" Wilson, *Int. L.*, (1910) 205. "A treaty of guarantee is an engagement by which a state agrees to secure another in the possession of certain specified rights, as in the exercise of a certain form of government, in the free exercise of authority within its dominions, in freedom from attack, in the free navigation of specified rivers,

in the exercise of neutrality;" Wilson & Tucker, *Int. L.*, (1901) 211. "Treaties of guaranty are compacts under which a State promises to aid another State, if it should be disturbed in the enjoyment of a Conventional Right as distinguished from a Natural Right;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 430 et seq. Cases of treaties of guarantee: Treaty of Tilsit, by which Germany and Russia guaranteed to each other the integrity of their respective possessions; Hall, *Int. Law*, 6 ed. (1909) 334; Woolsey, *Int. L.*, 6 ed. (1897) 454. Treaty of April 13, 1856, by which Great Britain, Austria and France agreed to guarantee "jointly and severally the independence and integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th of March;" Hall, *Int. Law*, 6 ed. (1909) 334; Woolsey, *Int. L.*, 6 ed. (1897) 473. Treaty of 1831 and 1839, by which Belgium was constituted an independent and neutral state, the several states guaranteeing the neutrality. 1855—Treaty by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory of the crowns of Sweden and Norway, nor to conclude any right of pasturage or fishery or other rights of any nature whatsoever in consideration of a guarantee by Great Britain and France of the Swedish and Norwegian territory; Hall, *Int. Law*, 6 ed. (1909) 334-335. 1776—Russia guaranteed a loan of 500,000 ducats contracted by Poland. 1815—The 97th Article of the Treaty of Vienna especially provided for the credit and solvency of the establishment called "Mont Napoléon" at Milan; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 389. See Hershey, *Int. L.*, (1912) 317; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 84 et seq.; 1 Wildman, *Int. L.*, (1849) 168 et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 166, 463. 1902—

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Treaty between Great Britain and Japan; Hall, *Int. Law*, 6 ed. (1909) 336.

³² Jurisdiction: Treaties of jurisdiction are of two kinds: (a) For special tribunals to adjudicate controversies among foreign merchants or between foreign merchants and natives; (b) for exercise of jurisdiction by consular or commercial agents; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 402 et seq.

³³ Law-making: See §399, post.

³⁴ League: "The term league has been adopted by Kennett, the translator of Puffendorf, to distinguish that species of public compact between nations which do not presuppose a state of war." See Twiss, *L. of Nations, Peace*, 2 ed. (1884) 382-399, who uses the word "league" as synonymous with treaty.

³⁵ Marriage: 2 Ward, *Hist.*, (Dublin, 1795) 145-153.

³⁶ Memoranda-Memoires: The terms "memoranda" and "memoires" are used to indicate the documents in which the principles entering into an international discussion are set forth, together with the probable conclusions; Wilson & Tucker, *Int. L.*, (1901) 200.

³⁷ Military or Warlike: Military or warlike conventions are when the leaders of a war agree together on certain terms. Inferior leaders may make such agreements or conventions relating to the administration of the war: safe conduct; armistice; exchange and ransom of prisoners; terms to be granted to those who surrender besieged places; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 3. Military or warlike treaties are concluded by the authority of the persons who have the supreme power either for a prolonged armistice, which is commonly called a truce, or for a perpetual peace; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IX. 4.

³⁸ Modus-Vivendi: Modus-Vivendi

are agreements to carry on an existing state of affairs pending a final determination. "A Modus-Vivendi is a temporary regulation of a matter pending negotiations for a permanent settlement;" Crandall, *Treaties*, 2 ed. (1916) 7.

³⁹ Neutrality: See §§962, 930, post, on neutrality. "Treaties of Neutrality are reciprocal engagements to have no part in the conflicts between other powers, to remain at peace in an apprehended or an actual war;" Woolsey, *Int. L.*, 6 ed. (1897) 164. "Treaties of neutrality are treaties under which the absolute Neutrality of a Nation is agreed upon, or particular acts of Neutrality on its part are covenanted for;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 437. See Vattel, (1758) Chitty's *Trans. Book III.* §107.

⁴⁰ Pactum de Contrahendo: "is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 547.

⁴¹ Parol: is a technical term of the English common law describing contracts not under seal, whether verbal or written and entirely inapplicable in international law.

⁴² Peace, Treaty of: "When the belligerent powers have agreed to lay down their arms, the agreement or contract in which they stipulate the conditions of peace, and regulate the manner in which it is to be restored and supported, is called the treaty of peace;" Vattel, (1758) Chitty's *Trans. Book IV.* §9. "A treaty of peace is an agreement between belligerent states to settle their differences by way of compromise;" 1 Wildman, *Int. L.*, (1849) 139. See Crandall, *Treaties*, 2 ed. (1916) 352; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 438; 1 Wildman, *Int. L.*, (1849) 139-158, elaborate discussion; see §639, post, on treaties of peace.

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⁴⁴ Personal, Real: A distinction has been drawn between treaties real, which bind the contracting parties (i. e. the states), independently of any change in the rulers, and treaties personal, which are such as are made with a view to the person of the ruler and only bind the state during his continuance in office. This distinction was laid down by Vattel, (1758) Chitty's Trans. Book II. §§183-197, and was adopted for a while; 1 Halleck, Int. L., 4 ed. (1908) 303; Twiss, L. of Nations, Peace, 2 ed. (1884) 388-391; 1 Wildman, Int. L., (1849) 138, 139; Wheaton, Elements, Dana's ed. (1866) 43; Martens, G., Law of Nations, (1788) Cobbett's Trans. II. 1. 5, but is now obsolete; Hershey, Int. L., (1912) 311n³. Twiss, L. of Nations, Peace, 2 ed. (1884) 391, 397, discusses Holy Alliance of 1815, and the family compact of the House of Bourbon of Aug. 15, 1761, as examples of personal leagues.

⁴⁵ Preliminary Treaty: "Preliminaries of peace are an agreement intended to put an end to hostilities at an earlier moment than that at which the terms of a definite treaty can be settled. They contain the stipulations which are essential to the re-establishment of peace, together sometimes with arrangements having a temporary object; minor points which lie open to discussion or bargain, and details for the settlement of which time is required, being held over for more leisurely treatment. Preliminaries thus constitute a treaty which is binding in every respect so far as it goes, but which is intended to be superseded by a fuller arrangement, and is so superseded when the definite treaty is signed. For an example of preliminaries and of a definite treaty of peace, see the Preliminaries of Versailles and the definitive treaty of Frankfurt in D'Angeberg, Nos. 1119 and 1179;" Hall, Int. Law, 6 ed. (1909) 555n¹.

"A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty and therefore binding upon the parties;" 1 Oppenheim, Int. L., 2 ed. (1912) 546.

⁴⁶ Private: Relating to private affairs of monarchs or not public.

⁴⁷ Protection: Treaties of protection: unequal alliance of small state with greater; 2 Ward, Hist., (Dublin, 1795) 159-161.

⁴⁸ Protocols: "Protocols" are preliminary agreements entered into before the signing of the treaty itself. "During the negotiations for a treaty the discussion of each sitting and the resolutions arrived at are set down in a document called a Protocol;" Hall, Int. Law, 6 ed. (1909) 321n³. "A protocol or proc's verbal, is usually in the form of official minutes, giving the conclusions of an international conference and signed at the end of each session by the negotiators;" Wilson & Tucker, Int. L., (1901) 199. "Protocols vary greatly, but generally are preparatory to a more formal agreement;" Wilson, Int. L., (1910) 192. "The term protocol is regularly applied to a record, or minute, of the proceedings of a conference between plenipotentiaries, or of an agreement between plenipotentiaries as to the result of their negotiations or as to the basis of future negotiations." "The term proc's verbal is equally applicable;" Crandall, Treaties, 2 ed. (1916) 6n16, n⁷. "A protocol, or proc's verbal, generally referring to an agreement already made or to be made, is usually less formal than a convention both in phrasing and arrangement. Protocols are sometimes formally ratified by the treaty-making power and sometimes are simply the signed minutes of a

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conference;" Wilson, *Int. L.*, (1910) 192.

⁴⁵ Public: Treaties relating to affairs of governments as distinguished from affairs of monarchs, or not secret.

⁴⁶ Punctationes: Punctationes are "mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 546.

⁴⁷ Recognition: Treaties of recognition have for their object the admission of a new member of the family of nations or the recognition of a new title; 1 Halleck, *Int. L.*, 4 ed. (1908) 306.

⁴⁸ Renunciation: Deeds of Renunciation applicable to ancient custom in Europe of renouncing by solemn convention pretensions which might otherwise have been asserted; 2 Ward, *Hist.*, (Dublin, 1795) 161-163.

⁴⁹ Sale: 2 Ward, *Hist.*, (Dublin, 1795) 154, 155.

⁵⁰ Secret: See §341n^o, ante.

⁵¹ Special: Relating to some particular matter or negotiated for a particular occasion.

⁵² Sponsions: "Sponsions is the term we may use when persons not having a commission from the Supreme Authority make any engagement which properly touches that authority;" Grotius, *Belli. ac. Pacis* (1625), Whewell's *Trans.* II. XV. III., see XVI. "When representatives of states not properly commissioned for the purpose, or exceeding the limits of their authority, enter into agreements, their acts are called treaties sub spe rati, or sponsions;" Wilson & Tucker, *Int. L.*, (1901) 201. "Sponsions or agreements sub spe rati, are agreements made between representatives of states not properly commissioned, or agreements made by representatives in excess of authority;"

Wilson, *Int. L.*, (1910) 192. "Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called sponsions;" Wheaton, *Elements*, Dana's ed. (1866) 329. "By the Latin term Sponsio we express an agreement relating to affairs of state, made by a public person who exceeds the bounds of his commission, and acts without the orders or command of the sovereign;" Vattel, (1758) Chitty's *Trans.* Book II. §209. See Ayala, *Law of War*, (1582) Carnegie Ed., I. VII. 4.

⁵³ Subsidy: "Treaties of Subsidy are treaties under which a Power which does not take part in a war as a Principal furnishes a limited succor to another power as an Auxiliary;" Twiss, *L. of Nations, Peace*, 2 ed. (1884) 428; 2 Ward, *Hist.*, (Dublin, 1795) 177-188.

⁵⁴ Succor: 2 Halleck, *Int. L.*, 4 ed. (1908) 7.

⁵⁵ Truce: A truce is a cessation of hostilities between opposing military forces which may be only temporary or may continue until the termination of the war. It is generally of a local character confined to commanders of small bodies of troops, although it may be entered into by the commander-in-chief of the entire army. "Truce is a convention, by which, the war remaining, the parties are for a time to abstain from warlike acts;" Grotius, *Belli. ac. Pacis* (1625), Whewell's *Trans.* III. XXI. I. 1. See Ayala, *Law of War*, (1582) Carnegie Ed., I. VII. 6; Grotius, *Belli. ac. Pacis* (1625), Whewell's *Trans.* III. XXI. 1609—Truce for twelve years between Spain and United Provinces. 1684—Truce for twenty years between France and Spain and Spain and the German Empire; 1 Wildman, *Int. L.*, (1849) 139. See §770, post, on truces.

AUTHOR'S CLASSIFICATION.

§364. It will be observed that the classifications of treaties which have been adopted by the various authors confuse two important aspects which are independent of each other, and should therefore be separately discussed. The one is the classification of treaties with respect to the performance; that is, whether fully performed or not performed. The other, the classification with respect to the objects contemplated by the treaty.⁵ The latter classification can never be exhaustive as the changing aspect of international affairs will continually present new objects of international agreements. Since states are parties to treaties and state conduct only is involved in the international world, every treaty will relate to state conduct and treaties may be classified with respect to the particular objects, as follows: (A) Those relating to state territory, as treaties of boundary and cession, and neutralization of particular places. (B) Those relating to political conduct of states to each other and with respect to third states. (C) Those relating to the open sea. (D) Those relating to the treatment of members of one state within the jurisdiction of another. (E) Those providing for exercise of state functions by one state on the territory of another. (F) Those providing for joint administrative functions. (G) Those providing for identity of private municipal law or providing for regulation of conflicts therein. (H) Those applying to a third state. (I) Those relating to a state of war between the parties.

TREATY DISTINGUISHED FROM A FEDERAL CONSTITUTION.

§365. The constitution of a federal government, like that of the United States of America or of Switzerland, is formed by the union of several states. Sometimes these states were formerly independent, sometimes they simply passed from one state of dependence to the new state of dependence in the federal union. The compact between them is called a constitution and is to be distinguished from a treaty in that it sets up a new state and prescribes the form of government thereof, whereas, a treaty simply contemplates action of the parties to it as parties without setting up any superior political power. In the case of a constitution, the government is the result of the execution of the treaty between the states, and the preliminary agreement

⁵ See §373, post, on distinction between executed and executory treaties.

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drops out of sight and the new state as an entity is alone left in view, just as the engagement to marry is a contract which is fully executed and disappears as a result of the marriage. It should not be necessary to mention this point, but some writers have described these constitutions as treaties, and it therefore seems advisable to refer to the subject.

Obligation of a Treaty.

PRELIMINARY.

§366. In the municipal law a contract which conforms to requisites prescribed by that law is binding on the parties, and if one fails to perform, the other may have the assistance of the political power of the state to secure redress for the damages caused by such failure of performance. That is all there is to the binding effect of a contract. In the international world there is no political power which can afford redress for the breach of the terms of a treaty. The question, therefore, has been greatly discussed among the writers as to the binding effect of a treaty, that is, how far there is an obligation on a state to perform a treaty. The practice and notions concerning the obligations of a treaty have been considerably modified by the rise of democracies and growth of limitations on the power of the monarch. We shall refer to the historical aspects of the subject, and the means of securing performance which have been adopted.¹

HISTORICAL.

§367. The absolute monarch was the state, and a treaty entered into by him was his personal promise, and as such was hardly worth the paper it was written upon. It was obvious that the mere word of the prince was not to be trusted, and various means were resorted to in the attempt to add to the obligation of the treaty, namely,

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| ¹ Historical..... | §367 | Effect of rise of limited govern- | |
| Opinion and practice in favor of | §368 | ments..... | §370 |
| Factors impelling performance. | §369 | | |

oaths,² hostages,³ pledges, guarantees,⁴ offering persons as sureties, choosing third states as guarantors, and military occupation⁵ of territory, some of which have survived to recent times. The Pope frequently assumed the power of absolving a king from his treaty engagements.⁶

² Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. III. XIX. VIII. Thus, it was customary to add to the solemnity of a treaty by taking an oath over the bones of the saints, the gospels, wood of the true cross, the Host, and the like; or the parties frequently submitted themselves to the jurisdiction and censure of the Church. They apparently were greatly concerned lest the Pope should absolve one of them from his oath. See Mountague Bernard, "The Obligation of Treaties" (1868), quoted in Manning, *Int. L.*, 2 ed. Amos. (1875) 125, for examples of the language used in treaties to give them binding effect. The following treaties were confirmed by oath: 1526, Treaty of Madrid between Francis I. and the Emperor Charles V. 1529, Peace of Cambrai. 1559, Peace of Château Cambresis. 1648, Peace of Münster, between Spain and the revolting Dutch colonies. 1659, Peace of the Pyrenees. 1668, Peace of Aix-la-Chapelle between France and Spain. 1697, Peace of Ryswick; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 81. The last case of a treaty secured by oaths was that of the alliance between France and Switzerland May 28, 1777. See Crandall, *Treaties*, 2 ed. (1916) 11; 1 Halleck, *Int. L.*, 4 ed. (1908) 309; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 565, 566. For further instances of oaths of sovereigns, see Crandall, *Treaties*, 2 ed. (1916) 9-11.

³ The last case of hostages was that of the Peace of Aix-la-Chapelle of October 18, 1748, by which hostages were stipulated to be sent by Great

Britain to France for the purpose of securing the restitution of Cape Breton Island to France. Two hostages were sent and remained in France until July, 1749. See Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 5; Crandall, *Treaties*, 2 ed. (1916) 11, 12; Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. III. XX. LII. et seq.; Hall, *Int. Law*, 6 ed. (1909) 339; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 566; Wheaton, *Elements*, Dana's ed. (1866) 365; Woolsey, *Int. L.*, 6 ed. (1897) 170; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. IV. V. and IX. 5, II. IX. 52-54.

⁴ Third powers as guarantors; Crandall, *Treaties*, 2 ed. (1916) 12, 13; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 84 et seq.

⁵ Military Occupation: 1871, Preliminary Peace Treaty of Versailles between France and Germany at the conclusion of the Franco-German War, provided that Germany should retain military occupation of certain parts of France until the final payment of the war indemnity which was imposed upon France. The German troops remained in possession until the amount due was paid. 1 Oppenheim, *Int. L.*, 2 ed. (1912) 567; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 83. April 17, 1895—Treaty of Shimonoseki contained a provision for Japanese troops to remain in possession of Wei-hai-wei as security for China's further performance of the treaty; Crandall, *Treaties*, 2 ed. (1916) 12.

⁶ In the following cases the Pope absolved the parties from the obliga-

OPINION AND PRACTICE IN FAVOR OF BINDING EFFECT.

§368. Notwithstanding the fraud and deceit which prevailed in international relations, there was a strong opinion in favor of the notion that treaties should be observed, and there were a number of shining examples of such observance which stand forth in the dark history of medieval Europe. In recent times, this opinion has grown stronger, and the principle of the obligation of treaties is now universally assented to by all states, ** although sometimes violated in practice, and is supported by the unanimous opinion of the writers.⁷

tion of a treaty: Ferdinand, called "The Catholic," was released by Pope Julius II.; Francis I. by Leo II. and Clement VII.; Henry II. of France by the Papal Legate Caraffa; Crandall, *Treaties*, 2 ed. (1916) 11n²⁰; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 82. Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 310, contends, not without great force, that the conduct of the Pope is not to be judged by modern standards and conditions.

** 1747—"Glory be to God . . . , who among other things has rooted out all hatred and enmity from the bosoms of these nations, and has commanded them to keep their treaties inviolable, as the ever glorious book sayeth, O ye who believe, keep your covenants." Preamble to Treaty between Nadir Shah, Emperor of Persia, and Sultan Mahmoud, Emperor of the Turks. Quoted in 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 70. 1870—During the Franco-German War, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralization of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea. Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory powers of the Treaty of Paris, namely, Austria, Great Britain, France, Germany, Italy, Russia and Turkey, complied with the wishes of

Russia and abolished the neutralization of the Black Sea, it adopted in a protocol of January 17, 1871, the following declaration: "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 575. See 1 Cobbett Cases, 3 ed. (1909) 321 et seq. 1886—Russia notified her withdrawal from Article 59 of the Treaty of Berlin of 1878, stipulating the freedom of a part of Batoum, to which the other powers seemed to have consented, Great Britain protesting. 1908, October—Austria-Hungary, in violation of Art. 25 of the Treaty of Berlin of 1878, proclaimed her sovereignty over Bosnia and Herzegovina. 1908—Bulgaria, in violation of Art. 1 of the Treaty of 1878, declared herself independent; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 575, 576. 1914—Germany violated the provisions of the treaties guaranteeing the neutrality of Belgium and Luxemburg, to which she was a party, by making military use of the territories of these countries in the campaign against France which opened the War of the German Aggression (1914-1918).

⁷ Manning, *Int. L.*, 2 ed. Amos. (1875) 123, instances the multitude of subsisting treaties as a remarkable

tribute to the practical force which is attributed to the good faith of states. Vattel, (1758) Chitty's Trans. Book II. §163, says that the obligation of observing treaties is imposed by the natural law, and that the reproach of perfidy is esteemed by sovereigns a most atrocious affront. The following writers sustain the obligation of a treaty: Ayala, *Law of War*, (1582) Carnegie Ed., I. VI.; Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. III. XIX. XIII.; Wilson & Tucker, *Int. L.*, (1901) 209 et seq.; Zouche, *L. of Nations*, (1650), Carnegie ed., Part I. V. 34. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 542, 543, advances the following views on the binding force of treaties. He says the question can be satisfactorily dealt with only by answering several questions, which he propounds and answers as follows: (1) Why are treaties legally binding? To which he answers—that they are so because of a customary rule of the law of nations. The answer, however, begs the question, which is whether there is a rule of international law which makes them binding. Unless there is such a law, they cannot be binding, and even if such a law exists, there is the further question of the binding effect because of the impotency of that law, which, as have have seen, is in a condition of self-help. (2) What is the cause of the existence of such a customary rule? To which he answers that the rule is required by religious and moral reasons, as well as the interest of states, that there can be no law between nations in the absence of such a rule, to which he adds: "All causes which have been and are still working to create and maintain an International Law are at the background of this question." The answer to the second question clearly shows that the learned professor is simply saying that there are quite good reasons why treaties should be binding,

which statement no one will deny. Which, however, is not the same thing as a statement that they are in fact binding by law. The statement that international law cannot exist unless treaties are binding simply begs the question, which is whether they are binding by international law. To say, furthermore, that certain causes are at the background of a question is hardly a statement of sufficient precision in a treatise on a subject of such scientific difficulty as international law. (3) How is it possible to speak of a treaty as legally binding in the absence of judicial authority to enforce it? To which he answers that although there is a legal binding force to treaties, it is not the same as the binding force of contracts in municipal law, because international law is a weaker law than municipal law, and therefore less enforceable. But as international law does not lack legal character because of absence of judicial authority, so treaties have legally binding force even though there is no judicial authority to enforce them. Upon this it is to be observed that there is no question but that the absence of judicial redress in international law differentiates it from municipal law. To state that proposition, however, does not answer the question. When he says that international law does not lack legal character, he refers to §5 of his book, which has already been discussed, where he says that international law is law of some kind, but leaves entirely open the question whether he assumes it is law with a judicial right of redress, or law with only a right of self-help. If we grant his proposition—that international law is law in the sense that municipal law is, then it follows from the definition that treaties are legally binding. If, however, we disregard this assumption, the question remains open to further inquiry. Martens,

FACTORS IMPELLING THE OBSERVANCE OF A TREATY.

§369. It is now important to consider in what respect treaties are binding. A contract is binding in municipal law because of (A) the attitude of the party who considers himself bound in honor, (B) the judicial remedy afforded by the political power of the state in case of a breach, (C) the fear of public condemnation visited because of failure to keep the contract, and the disastrous personal effect of the failure to perform one's undertakings, (D) pressure from the other party to the contract in the shape of reprisals and perhaps a refusal to have further dealings. In other words, men are honest because of inborn instinct, because they are forced to be honest, or because it pays to be honest. The self-interest of an individual, therefore, which will frequently impel him to break a contract, is restrained by the factors mentioned. All these factors are present in international life except that of judicial remedy, and there is here the additional factor of force which is usually absent or negligible in individual affairs. A state, therefore, will be impelled to observe a treaty by (A) self-interest. This is usually present. Treaties are framed with more care than is usually exercised by individuals in making contracts, and they commonly represent the best possible adjustment at the time of the conflicting self-interest of the parties. (B) International public opinion.⁸ The force of international public

quoted in 1 Halleck, *Int. L.*, 4 ed. (1908. 309, says the following elements are necessary to make a treaty binding: (1) that the parties have power to contract, (2) that they have consented, (3) that they have consented freely, (4) that their consent is mutual, (5) that the execution is possible. This, however, introduces too many conceptions of the municipal law, and does not cover the subject even from that point of view. For a discussion of the binding effect of treaties, see Hall, *Int. Law*, 6 ed. (1909) 318 et seq.; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 69 et seq.; Wilson, *Int. L.*, (1910) 194, 195; Woolsey, *Int. L.*, 6 ed. (1897) 158, 159. Walker, *Man. Int. L.*, (1895) 84, says conditions in fact to the international validity of a treaty are chiefly four: (1) Contractual capacity of the parties.

(2) The contracting agents must contract within the terms of their authority. (3) The contracting parties must freely consent. (4) The objects of the treaty must not contravene the principles of international law; Hershey, *Int. L.*, (1912) 312, Acc. "The Legal Nature of Treaties," Quincy Wright; 10 *Amer. J. Int. Law*, 706 et seq. Crandall, *Treaties*, 2 ed. (1916) 8, says: "Although the obligation of a treaty is, accordingly not perfect for want of a tribunal in which it can of right be enforced, it has such sanctions as impel observance of recognized right under international law, since the violation of a treaty engagement is a violation of right." This, however, begs the question.

⁸ International public opinion: Germany, in 1914, violated her treaty

opinion impelling an observance of treaties is not to be despised or overlooked. (C) Pressure from other states.⁹ Pressure may be exercised by diplomatic suasion,¹⁰ threat of or the use of force, and may be applied by the other party or parties to the treaty or by third states not parties. The other state may also resort to reprisals,

obligations with respect to the neutrality of Belgium, at first with insolent contempt. When, however, she felt the force of international public condemnation, she immediately began to invent excuses for the violation, asserting that France had violated the treaty first, and therefore she was excused in doing what she did. This public opinion is gaining strength every day with the increased diffusion of education among the masses.

⁹ Pressure from other states: Instances of treaties enforced by direct pressure of one contracting party against the other: 1850—Case of Sulphur Monopoly in the Kingdom of the Two Sicilies. By treaty concluded in 1816 between Great Britain and the Kingdom of the Two Sicilies, certain commercial advantages were secured to citizens of Great Britain, and the Neapolitan Government stipulated that no mercantile privileges disadvantageous to such interests should be granted to any other state. In 1847, the Kingdom of Naples granted a monopoly of all the sulphur worked and produced in Sicily to a company of private individuals, nationalists of different countries. In consequence of the refusal of the King of Sicily to rescind the grant of the monopoly, the English fleet commenced hostilities in the vicinity of Naples, whereupon the Neapolitan government gave way; 1 Halleck, *Int. L.*, 4 ed. (1908) 115; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 35-37. 1840—Great Britain and Portugal. Portugal compelled to sign a convention for payment of certain claims of British Legion and British auxiliary force in Portugal. The

account is obscure; 1 Halleck, *Int. L.*, 4 ed. (1908) 115. The United States Congress, by resolution of July 7, 1798, declared that treaties with France were no longer obligatory on the United States, as they had been repeatedly violated by the French Government and all just claim for reparation refused. The French Government refused to admit the abrogation of the treaties; 1 Halleck, *Int. L.*, 4 ed. (1908) 347; 5 Moore, *Dig. of Int. L.*, (1906) 356. Action of United States of America in enforcing treaty of July 4, 1831, for settlement of spoliation claims against France. See 7 Moore, *Dig. of Int. L.*, (1906) 123. Vattel, (1758) Chitty's *Trans. Book II.* §§221, 222, advances the opinion that where a nation has violated a treaty, other nations are justified in forming a confederacy to punish the violating nation. This opinion has been criticised by subsequent writers, for example, Halleck, *Int. L.*, 4 ed. (1908) Vol. 1, 308, who says that Vattel is not sustained by later authorities. The events of the War of German Aggression (1914-18), however, where Germany brought down upon herself the coalition of nearly all the great powers of the world, largely because of her violation of the terms of a treaty, seem to lend great weight to Vattel's opinion.

¹⁰ Treaties enforced by diplomatic suasion: 1865—Great Britain endeavored by diplomatic action to induce Russia to observe the treaty engagements she had made with respect to Poland, and failed, and did not regard it as expedient to go to war; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 97nc.

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and thus enforce compliance. There is also an element of necessity. It is necessary for independent states in their conduct with each other to be able to entertain a reasonable well-founded expectation that other states will observe their written obligations.

EFFECT OF RISE OF LIMITED GOVERNMENTS.

§370. With the rise of democracy and the growth of constitutional limitations on the power of the king, the idea of the state, as being embodied in the person of the king, disappeared.¹¹ A state is now regarded more nearly as a corporation, and at least is not regarded as the personal property of any individual or as representing the personal faith or honor of any individual. An oath, therefore, is entirely inappropriate in the execution of treaties between such bodies; even in a constitutional monarchy the personal aspect of the king has disappeared in the larger aspect of the state. The Holy See has ceased to absolve the obligation of treaties and the result in modern times is to strengthen the external factors impelling the observance of a treaty.

OBLIGATION EXTENDS ONLY TO THE STATE.

§371. A state is the only party to a treaty, and if the treaty has any obligation at all, it is obligatory only on the state in its corporate capacity.¹² Individuals within the state are affected only by the municipal law imposing on them an obligation conforming to the superior obligation resting upon the state. This command of the municipal law may appear either in an act of the legislature or in a decree of the court. A failure of the state to make the municipal law conform to the obligation of the treaty is simply a failure to carry out the terms of the treaty.

INTERNAL EFFECT OF A TREATY.

§372. A number of questions will arise as to internal effect of a treaty. If a treaty has been executed by a state, it then becomes necessary for the subordinate agents of the state and the individual members to, as far as the treaty affects them, comply with its terms. In the days of monarchies, no difficulty was presented because the

¹¹ It is to be understood that these remarks do not apply to the few autocracies, such as Germany and Austria-

Hungary, etc., which (1918) still remain.

¹² 1 Oppenheim, Int. L., 2 ed. (1912) 362.

king simply issued the necessary orders after the treaty was made and the municipal life at once conformed. Now, however, in the days of modern limited governments, with a distribution of the powers of the state and of the executive, judicial and legislative, a number of difficulties arise which formerly did not exist.¹³ The treaty-making function, as we have seen, is carried on by the head of the state and when he has acted and the necessary organs of state have ratified, it may become incumbent upon another branch of the government, as, for instance, the legislature,¹⁴ to enact the

¹³ United States of America: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding;" Constitution of 1787, Art. VI. par. 2. Necessary legislation by congress: 5 Moore, Dig. of Int. L., (1906) 221-243; Wheaton, Elements, Dana's ed. (1866) 339. Effect of treaty on state constitution and statutes: 5 Moore, Dig. of Int. L., (1906) 371. As to whether treaty-making power of the United States is limited by federal constitution, see cases cited: Hershey, Int. L., (1912) 312n.⁴ As to effect of a treaty on state law, tenure of property: 5 Moore, Dig. of Int. L., (1906) 175. See §449, post. Cession of territory of a dependent state: 5 Moore, Dig. of Int. L., (1906) 171. This has only happened once, in the case of the Northeastern boundary settlement with Great Britain in 1842, in which case the consent of Maine and Massachusetts was obtained. There is a difference of opinion as to whether the consent of a state is necessary. As to subsequent legislation inconsistent with a treaty, see 5 Moore, Dig. of Int. L., (1906) 364. "The treaty-making power of the United States and the methods

of its enforcement as affecting the police powers of the state," C. H. Burr. Proceedings Amer. Philosophical Society, Aug., Sept., 1912. "National Supremacy; Treaty Power; State Power;" (1913) Edward S. Corwin, See 27 Harv. Law Rev. 402. As to Act of Congress repealing provisions of a treaty in the United States, see Crandall, Treaties, 2 ed. (1916) 465. "The treaty power under the Constitution of the United States," Robert T. Devlin (1908), See 22 Harv. Law Rev. 311, et seq. "Limitations on the treaty-making power under the Constitution of the United States," H. St. George Tucker (1915), See 28 Harv. Law Rev. 826. "Treaties and the Constitutional Separation of Powers in the United States," Quincy Wright; 12 Amer. J. Int. Law, 64 et seq. "The treaty-making power of the United States and alien land laws in States," James Harrington Boyd; 6 Cal. L. Rev. 279-294. "The Supreme Court and the treaty-making power, Henry St. George Tucker;" Georgia Bar Ass'n, 1917; Crandall, Treaties, 2 ed. (1916) 153 et seq. "The Constitutionality of Treaties," Quincy Wright; 13 Amer. J. Int. Law, 242.

¹⁴ Thus, the provisions of the commercial treaty of Utrecht between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into

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legislation necessary to carry out the terms of the treaty. Here we have frequently jealousy arising between the various branches of the government, which sometimes results in a treaty not being properly carried out. So also we have in the legislative branch a deep-seated popular distrust of the treaty-making function. The common people have for so many centuries been at the mercy of kings and dragged into unnecessary wars over matters which they did not understand, and disposed of in treaties some of them secret, that today the popular mind is strongly distrustful of international agreements. The future of international relations depends to a very considerable extent upon the education of the mass of the people to a proper understanding of the obligations of treaties. When it comes to a violation of the terms of the treaty, we will find, for the reasons above mentioned, that limited governments have been frequent offenders.^{14*}

DISTINCTION BETWEEN EXECUTED AND EXECUTORY TREATIES.

§373. It is to be observed, in the first place, that an executed treaty cannot be said to have any binding effect because it has been performed, and there is nothing left for either of the parties to do. There is no room, therefore, to impose any obligation under it. It has been supposed, however, that there is an obligation of some sort surviving the performance of the treaty.¹⁵ It is apprehended that the notion is without weight.

effect, the British Parliament having rejected the bill brought in to change the municipal law; Wheaton, *Elements*, Dana's ed. (1866) 339.

^{14*} "Violation of Treaties by Adverse National Action," Denys P. Myers; 12 *Amer. J. Int. Law*, 96 et seq.

¹⁵ Hall, *Int. Law*, 6 ed. (1909) 340. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 570, says that the performance of a treaty does not terminate its binding force, and it is as valid as before, although now of historical interest only. It is difficult, however, to perceive what is the binding force of a treaty which neither party is obligated to perform. The learned professor probably has in mind the fact that the altered state of facts brought about by the performance of such a treaty continues in existence

by virtue of such performance. See Twiss, *L. of Nations, Peace*, 2 ed. (1884) 418-421; Wheaton, *Elements*, Dana's ed. (1866) 340; Wilson & Tucker, *Int. L.*, (1901) 214. Thus, if a treaty of cession is made and carried out, as, for instance, the treaty between the United States and Denmark, relative to the transfer of the Virgin Islands, the territory ceded becomes a part of the other state. In the case put, the Virgin Islands are now a part of the territory of the United States of America. The notion in question, however, appears to go to the point of maintaining that Denmark is under a duty or obligation arising out of the treaty to refrain from interfering with the United States' exercise of jurisdiction over these islands. It is no more

Excuse for Non-Performance

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Excuse for Non-Performance.

PRELIMINARY.

§374. There are two questions, as in municipal law, which, however, are not clearly distinguished by the international law writers. The first is—is the treaty binding? The second is, assuming that it is—are there any excuses for its violation which may be recognized? Since there is no political power superior to the independent states of the world to pass on the validity of any excuse, the question can only be resolved by the operation of the forces impelling the observance of the treaties already referred to. If the contract is binding in municipal law, that is, has been properly formed, then there is no escape from its obligation except by some legally recognized excuse. If it is not binding, then the question of excuse is not reached, but the party may set up a refusal to be bound at all because there never was any valid contract. The escape from the obligation of the contract must be considered from one point of view or the other, and both cannot be entertained at the same time, although the writers have frequently made the attempt. Many of the writers confuse the termination of the treaty with the question of excuse for non-performance. Termination can only be a coming to an end of something which has been continuing, and therefore is only applicable to executory treaties, those calling for continuing performance or treaties about to be executed. The doctrine of excuse for non-performance is a development of modern and refined jurisprudence, and was probably little known among primitive tribes where the doctrine of self-help prevailed. It may accordingly be expected that in the international world the doctrine will be weak. The attempt to apply the ideas of the advanced development of municipal law to the more or less primitive state of affairs of the international world has caused some difficulty. The classification of some of the writers is collected in the note.¹

competent for Denmark to undertake to retake possession of those islands than it would be for Denmark to attempt such an act with respect to Massachusetts, Virginia or Texas. The United States must maintain the integrity of its territories by force, and if it is not able to do that, no principle of

any kind can save it. Why, therefore, invent a fanciful conception of contract obligation surviving the full performance of a treaty to account for conduct which can as well be explained by the facts of international life?

¹ Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 570 et seq., says the binding

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force of treaties may be terminated in various ways, as follows: (A) Expiration: (a) Of time for which made, may be renewed; (b) Occurrence of a resolutive condition which is a condition that the treaty shall expire with the occurrence of certain circumstances. What the learned professor means is the happening of the condition or the occurrence of the facts specified in the condition. (B) Be dissolved: (a) By mutual consent (1) Express declaration of parties' rescission; (2) Concluding a new inconsistent treaty—substitution; (3) Renunciation of obligation of one party by the other party. Acceptance necessary. (b) By withdrawal by notice; (c) By vital change of circumstances. (C) By becoming void: (a) Extinction of one of the parties; (b) Impossibility of execution; (c) Realization of the purpose of the treaty otherwise than by fulfillment; (d) Extinction of such object as was concerned in a treaty. (D) Cancellation: (a) Inconsistency with international law created subsequent to the conclusion of the treaty; (b) Violation by one of the contracting parties; (c) Subsequent change of status of one of them; (d) War. It is clear that the learned author does not use these terms with the legal precision common to lawyers, and that his classification is open to serious objection. On pp. 580, 581, he speaks of a renewal of treaties, the reconfirmation of an old treaty by express statement in a new treaty and reintegration, which is the revival of an expired or cancelled treaty, which revival may be tacit or express. Hershey, *Int. L.*, (1912) 319, says, treaties may: (A) Become extinct: (1) Through expiration of their time limit; or by (2) Performance of the specific object of the contract. (B) Be dissolved by: (1) Mutual consent; (2) Express renunciation of advantages; (3) Voluntary release by one of the contracting

parties; (4) Denunciation; (5) Withdrawal by notice in accordance with terms of the agreement. (C) Become void upon: (1) Cessation of conditions essential to continuance of the treaty; (2) Extinction of: (a) The object; (b) The object of the treaty. (3) If found impossible of execution: (a) Legally; (b) Morally; (c) Physically; (4) In certain cases on outbreak of war. (D) Become voidable, that is, subject to annulment or cancellation: (1) By war; (2) Subsequent change in international personal status of one of the parties; (3) If terms inconsistent with subsequent international law; (4) If any of the implied conditions under which the treaty is made are violated. Which implied conditions are: (a) That a treaty shall be observed in its essentials by both parties; (b) That it shall remain consistent with the fundamental rights of independence and self-preservation; (c) That there shall be no vital change in the circumstances or conditions under which the treaty was made. The clause *rebus sic standibus* is an implied condition in all treaties. Hall, *Int. Law*, 6 ed. (1909) 339–341, says that international contracts are extinguished: (A) When their objects are satisfied, which is by (a) Termination of period fixed; (b) Performance, as payment of money. But when the true object of the treaty is to set up a permanent state of things and not barely secure performance, as a treaty of cession or for recognition of a new state, it is not extinguished by the performance because the state performing remains under an obligation until the treaty has become void or voidable in one of the ways next indicated as applicable. (B) When a state of things arises through which they become void, and they temporarily or definitely cease to be obligatory, when a state of things arises through which they are suspended or become voidable, as (a) By

BREACH BY THE OTHER PARTY AS AN EXCUSE.

§375. It is clear in the absence of any superior political power to afford redress and the general inadequacy of the means of redress available in international life, that the refusal to perform a treaty may often be sustained. The question now is whether, if there is a refusal to perform by one party, the other party may set up such breach as a ground for refusal to go on. It seems clear that in municipal law such a contention is a valid excuse and it is difficult to see how international public opinion would sustain any state in taking means of international redress where it is the first party which has broken the treaty.² The question as to breach by either party as excuse raises the question of the entirety of a treaty. It has sometimes been said that a treaty is an entire contract, that all its articles are dependent, and have the force of conditions, so that the violation of any one of them is a violation of the whole treaty, and renders it voidable at the option of the party injured.³

mutual consent of the parties, express or implied; (b) By express renunciation by one of the parties of advantages taken under it; (c) By denunciation: (1) Where right of, expressly reserved; (2) When treaty is voidable at the will of one of the parties, being evidently not intended to set up a permanent state of things. (d) By execution having become impossible; (e) When an express condition upon which the continuance of the obligation of the treaty is made to depend ceases to exist;

(f) By incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views held with respect to morals. All of which, he says (p. 341), resume themselves into: (1) Impossibility of execution; (2) Consent of the parties; (3) Satisfaction of the object of the contract; (4) Incompatibility with undisputed law and morals. He further says (341) that there is no difficulty in stating the conditions under which treaties cease to be binding, and that with regard to them there can be no room for disagreement and little for the

exercise of caution. But that it is less easy to lay down precisely the conditions under which a treaty becomes voidable.

² See Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 17; Crandall, *Treaties*, 2 ed. (1916) 456; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 51, II. V. 13. A state may refuse to go on with a treaty which another state has broken, but cases have occurred where a state has considered it dishonorable to justify a breach of one treaty by a breach by the other party of a different treaty. See case of Great Britain in 1865, cited in 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 97nc.

³ Grotius, *Belli. ac. Pacis* (1625), Whewell's Trans. II. XV. 15; Vattel, (1758) Chitty's Trans. Book II. §202, IV. §47; 1 Wildman, *Int. L.*, (1849) 174. The treaty of Nimeguen, of April 10, 1678, between France and the United Provinces, provided in the 14th Article that if by any inadvertence, any violation of the treaty should occur, it should nevertheless continue in full

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ILLEGAL AND IMMORAL TREATIES.

§376. It has often been said that a treaty is not binding which is in violation of international law or contrary to morals.⁴ This is a mere opinion of the writers. Since there is no tribunal in existence over the states to determine the question, we must assume that every obligation between two states is equal in all respects in validity to every other obligation. So, also, the statements in the books that immoral treaties are void, and that a treaty cannot provide for the doing of an act by a third party, are merely academic, and an expression of ethical factors which, as has already been pointed out, must be ignored.

IMPOSSIBILITY OF PERFORMANCE.

§377. Impossibility of performance may occur in international as well as in municipal life, and in such a case the treaty will necessarily be broken because the party cannot perform. The instance usually cited is where three states contract a treaty of alliance, and two of them subsequently engage in war. The third state obviously

force, and reparation should be promptly made, and all private persons concerned in such violation should be punished; 1 Wildman, *Int. L.*, (1849) 175. See Hall, *Int. Law*, 6 ed. (1909) 343. "If one party to a treaty has broken it, the other may abandon it; because each clause of a treaty has the force of a condition;" Zouche, *L. of Nations* (1650), Carnegie ed., Part II. V. 13; Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. XV. XV.

⁴ Ayala, *Law of War*, (1982) Carnegie Ed., I. VI. 14; Woolsey, *Int. L.*, 6 ed. (1897) 163; Hall, *Int. Law*, 6 ed. (1909) 341, cites as an example—a treaty which has for its object the re-establishment of the slave trade. Phillimore, *Int. L.*, 3 ed. (1879–1888) Vol. 2, 78, 79, says a treaty cannot contain (a) engagements inconsistent with those already entered into with other states; (b) an engagement to do or to allow that

which is contrary to morality and justice; (c) it may be invalid upon the ground of physical impossibility existing at the time or supervening from later circumstances. Vattel, (1758) Chitty's Trans. Book II. §161, says that a treaty concluded for an unjust or dishonest purpose is absolutely null and void for want of sufficient powers, nobody having a right to engage to do things contrary to the law of nature, and instances an offensive alliance for the purpose of plundering a nation. Hall, *Int. Law*, 6 ed. (1909) 338, 339, says that third states are not bound to observe a treaty between other states contrary to law. See §396, post, on treaties and third parties. "Conflicts between International Law and Treaties," Quincy Wright; 11 *Amer. J. Int. Law*, 566. "Treaty Violation and Defective Drafting," Denys P. Myers; 11 *Amer. J. Int. Law*, 538.

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cannot be an ally of both.⁵ Some writers would perhaps take the ground that in such a case there was an implied condition that none of the parties to the treaty would fight with each other; or it may be supposed that a treaty of alliance necessarily precludes the idea of hostilities between two of the parties, and therefore those two, by engaging in war, break the treaty and free the third state from any obligation of performance. Even in municipal law, the redress in such case would extend merely to compensation by way of damages and never to specific performance. Among independent states, damages for breach of a treaty are probably unknown, and what each state requires, if it requires anything under a treaty, is specific performance by the other party. International public opinion would undoubtedly in most cases view with favor the relief of the state bound to perform.⁶

FRAUD.

§378. Fraud undoubtedly vitiates a contract in the municipal law, and an opinion has been expressed that the same principle applies in international law. We have found no case involving the question but undoubtedly international factors of conduct would strongly operate to relieve the defrauded party of the obligation of a treaty obtained under such circumstances. No definite statement can be made as the state perpetrating the fraud may nevertheless insist

⁵ See discussion, Zouche, L. of Nations (1650), Carnegie ed., Part II. IV. 32.

⁶ It has been suggested [1 Oppenheim, Int. L., 2 ed. (1912) 577] that a treaty becomes void when impossible of performance. This, however, it is submitted, is a misapprehension. A treaty is void in the beginning because of some defect in the manner of the making, but if valid then it can never thereafter become void. It may become impossible of performance, or there may be some reason why it cannot be performed which will be admitted as an excuse. "In 1654, a treaty was entered into between England and Portugal, by which, among other

things, both countries mutually bound themselves not to suffer the ships and goods of the other taken by enemies, and carried into the ports of the other, to be conveyed away from the original owners or proprietors. 'Now, I have no scruple in saying' (observes Lord Stowell, in 1798) 'that this is an Article incapable of being carried into literal execution, according to the modern understanding of the Law of Nations, for no neutral country can interpose to wrest from a belligerent prizes lawfully taken.' This is, perhaps, the strongest instance that could be cited of what civilians call the 'consuetudo abrogatoria;' " 1 Phillimore, Int. L., 3 ed. (1879-1888) 43.

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upon compliance, which action would quite likely lead to war if the states were of any great disparity in strength.⁷

INCONSISTENT TREATIES.

§379. It has sometimes been said that treaties cannot be made contrary to those already in existence. This is an academic statement because obviously the inconsistent treaty can be made; the question is as to the effect of the second treaty on the first,⁸ which is a question of construction.⁹

PREJUDICIAL TO THE INTEREST OF THE STATE.

§380. It has been suggested that a treaty ruinous to a state or destroying the state organization is beyond the power of the head of the state, and that such a treaty would be illegal or null and void. What is meant is, that the people as a body would refuse to perform such a treaty and require the head of the state to go back on his word, and the question whether such action would be successful will be determined in the last analysis by force, that is, whether the state is powerful enough to maintain its position. A treaty may become burdensome to the best interests of the state, and it may turn out that the performance of its terms will be of serious damage to the interests of the people of the country. Is there any ground to escape the obligation of the treaty, assuming that such an obligation exists? There is, as we have seen, no power superior to the state to determine whether the performance of the treaty is in fact prejudicial, and every state will be guided by its own discretion and self-interest,

⁷ See Crandall, *Treaties*, 2 ed. (1916) 3; Hall, *Int. Law*, 6 ed. (1909) 320; Woolsey, *Int. L.*, 6 ed. (1897) 161; Zouche, *L. of Nations* (1650), Carnegie ed., Part I. X. 3; part II. IV. 35.

⁸ For inconsistent treaty policy of countries in which different conduct has been observed in dealing with different countries, see Hall, *Int. Law*, 6 ed. (1909) 10, 11. "A sovereign already bound by a treaty cannot enter into others contrary to the first. The things respecting which he has entered into engagements, are no longer at his disposal;" Vattel, (1758) Chitty's

Trans. Book II. §165. Thus, the provision of the Declaration of Paris of 1856, abolishing privateering, ipso facto abrogated all provisions of existing treaties providing for privateering made between the parties to the declaration; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 578. See, however, n. 1 on same page. For instances, see 5 Moore, *Dig. of Int. L.*, (1906) 363. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 2, 126 et seq., discusses the subject under heading of collision of treaties.

⁹ See §397, post, on interpretation of treaties.

subject to the external compulsions of international public opinion and pressure from other states. The practical question in each case will be—which is the stronger—self-interest or external compulsion? It is useless to attempt the statement of rules applicable to such a case. The plain long and short of it is that every state will disregard a treaty which it considers ruinous whenever it feels strong enough to do so.¹⁰

In the municipal law an individual cannot set up as an excuse for the non-performance of a contract the circumstance that the fulfillment of the promise would be prejudicial to his interest or ruinous. That is, according to the municipal law, when he makes the contract, and when one of the circumstances turns out unfavorable, he has no one but himself to blame. In the international world, however, it has been strongly urged that a treaty under such circumstances may be disregarded by the state.¹¹

¹⁰ The Germans in 1914, concluded that self-interest was stronger and violated the neutrality of Belgium in defiance of international public opinion and external pressure from other states.

¹¹ The opinion has been advanced that the state may disregard a ruinous treaty. Vattel, (1758) Chitty's Trans. Book II. §§157-160, says that a treaty is valid if properly entered into and may not be disregarded for mere injury; it is null and void when it would lead to the ruin of a nation because such a treaty is beyond the powers of the conductor of the state, since a state being under an obligation to preserve itself may not enter into engagements contrary to its indispensable obligations. Manning, *Int. L.*, 2 ed. Amos. (1875) 73, 74, says that an understanding actually exists among the powers of Europe to the effect that no delegate is supposed to have power to compromise a nation's vital prosperity, independence or permanent happiness, and that no nation is expected to fulfill a treaty at any enormous sacrifice to its happiness. He instances under the latter head a treaty of mutual succor, and

says that one of the states would not be expected to detail forces to aid the other when subject itself to an invasion, the repelling of which would require all its resources. Hall, *Int. Law*, 6 ed. (1909) 342, says that the doctrines laid down by the writers are of such perilous looseness that under them an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. This remark shows how far the writers are removed from the actual facts of life. It is a common saying at the bar that no contract can be written through which an astute and unscrupulous lawyer cannot drive a coach and four. If this is true, as it very largely is in municipal law, what can be said of the obligation of a treaty in international affairs where there is no political power to enforce it. The perilous looseness is not in the doctrine of the writers but in the structure of the international community. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 295, under the heading of "The Obsolescence of Treaties," appears to discuss certain cases where one of the parties may consider itself as no longer

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CHANGE IN CIRCUMSTANCES.

§381. It is generally stated by the writers that a change in circumstances will sometimes justify a state in refusing further performance of a treaty or that every treaty is entered into under an implied condition that the circumstances existing at the time will continue, and that a change in those circumstances will constitute a breach of the condition and effect a release from the obligation of the treaty.¹² The first question is—what change in circumstances will have such an effect? Upon this there is no agreement. Vital, essential, are the terms used, or it is said that the party entitled to disregard the treaty is only to act under a grave sense of moral responsibility. Such looseness of thought is open to serious objection, and entirely removes the principle from any possibility of accurate practical application. The doctrine of implied condition is purely judge-made, evolved to promote the doing of justice in affording redress on a contract. It is too refined for the rough jostling of independent states, and seems to have no place in the political anarchy of the international world. It is perfectly obvious that in international affairs cases will frequently arise where a change of circumstances will put an entirely different aspect on the obligation of a treaty and bring the self-interest of a state in direct opposition to further performance. Many of these cases will be so clear that all reasonable men will be in agreement. As to others, there will be a doubt which can only be adjusted by the action of the states concerned, in which action there is no external factor of restraint except those existing in the international world, to which we have already alluded.

bound. Obsolete means gone out of use, and obsolescence means the going out of use. The query arises—how is it proper to speak of a treaty which is void or as to which there is an excuse for its non-performance, as going out of use? He discusses under this heading the case of a party refusing to be bound because of a change of circumstances. After the return of Francis I. from captivity at the hands of Emperor Charles V., some of the principal people of France declared that the treaty of Madrid, forced from Francis by Charles, was void as contrary to the laws which in express terms prohibited the king

from dismembering the kingdom without the concurrence of the nation; Vattel, (1758) Chitty's Trans. Book I. §265. In 1506, the States General of France assembled at Tours, engaged Louis XII. to break the treaty which he had concluded with the Emperor Maximilian and the Archduke Philip (his son) because the treaty was pernicious to the kingdom; Vattel, (1758) Chitty's Trans. Book II. §160.

¹² The maxim of the civil law applies—*Conventio omnis intelligitur rebus sic stantibus*—or, as generally referred to: *Rebus Sic Stantibus*.

Contracts between individuals rarely extend over any considerable period of time, and those exceeding the duration of a human life exist only in the case of leases, which refer to a permanent object, as property. Most independent states are several centuries old and some of them can look back on a thousand years of state life. It is clear, therefore, that treaties entered into between such bodies as these will, in the course of time, be more frequently complicated by a change in circumstances than will the contracts of shorter duration in time entered into by individuals.¹³

Duress.

PRELIMINARY.

§382. Duress is of frequent occurrence in the international world, and with respect to treaties we may distinguish several cases: (A) Where the duress is applied to the making of the treaty and subsequently set up as an excuse for failure to perform; (B) Where the

¹³ The danger in the rule is that it may easily serve as a pretext for release from onerous treaty obligations; Crandall, *Treaties*, 2 ed. (1916) 441. This, however, is not an altogether accurate statement. The rule can only be advanced as a pretext and cannot serve as such unless accepted by the other party, and the danger is not in the rule but in the uncertainty in international relations. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 574, 575, says: "And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a state at once to liberate itself from the obligations of a treaty, but only the claim to be released from these obligations by the other parties to the treaty." "For it is an almost universally recognized fact that vital changes of circumstances may be of such a kind as to justify a party in modifying an unnotifiable treaty . . . that all treaties are concluded under the tacit condition *rebus sic stantibus*;"

Ibid. 572, 573. Hall, *Int. Law*, 6 ed. (1909) 342, says: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory forces at the time of its conclusion is essentially altered;" Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 296, quoting this passage, seems to think it is not a clear principle, although so designated by Hall, and says that the question only arises when there is a difference as to what conditions were implied or were contemplated; that the right of denouncing a treaty is an imperfect one, not to be condemned in toto, but only to be exercised on a grave sense of moral responsibility. For cases of change in conditions, see 5 Moore, *Dig. of Int. L.*, (1906) 335-341. "The obligations of a treaty cannot be affected by change of circum-

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duress is applied to the performance, of which two instances may occur—(a) where the duress prevents the performance of a treaty with another state, giving that state ground to complain and raising the question whether the state in default can set up the compulsion as an excuse for failure to perform;¹⁴ (b) where the state which has promised or performed under duress elects to disregard the promise or performance and treat either as null and void because of the compulsion. In municipal law there are cases where the individual may obtain relief from the obligation of a contract which has been imposed upon him by duress. This relief is administered by the political power of the state acting through its appropriate agents. In the international world, there is no political power superior to the independent state, and therefore there is no judicial remedy for relief from the obligation of a treaty which has been imposed upon a state by force. Force rules the international world, and that which has been accomplished by force and remains in continuance by force is the fact of that world. This is a matter of some difficulty as it is not easy at first for the student to perceive why the familiar principle which applies in municipal law does not apply to the relations of independent political communities. So also where one state violates a treaty, another state may be prevented by the former from interposing successful opposition to the breach. The partition of Poland was probably not so much a violation of a treaty, although some of the parties to the plunder may have broken special treaties, as it was a forcible destruction of the state by powerful neighbors.

There is a slight distinction to be drawn in this connection as a matter of historical interest. When the monarch was the state, it sometimes happened that he was the victim of duress, that is, the pressure was brought to bear upon him personally. Sometimes kings would be captured by their enemies, and while in captivity would be compelled to sign treaties.¹⁵ The opinion, therefore, was

stances, unless it be such as involves the breach of a condition or renders the performance of it impossible; 1 Wildman, *Int. L.*, (1849), 175. See Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 17; Crandall, *Treaties*, 2 ed (1916) 440 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 25.

¹⁴ Thus Belgium and Luxemburg, in

1914, were too weak to prevent Germany from forcibly violating her treaty obligations with regard to their respective neutrality.

¹⁵ Instances of treaties made under compulsion: 1111—Pope Paschal II. when prisoner, by Emperor Henry V.; 1356—John of France, when prisoner of Edward III. of England at Poitiers; 1525—Francis I. of France at Pavia by

strongly entertained that duress of this kind was personal duress, and if the party who had been subject to it afterwards regained his freedom and was able to do so, he might disregard the treaty which had been wrung from him by compulsion.

THE PRINCIPLES OF THE MUNICIPAL LAW INAPPLICABLE.

§383. The writers struggle generally to apply the analogies of the municipal law and to reach the same conclusion in international law, but are faced with two difficulties: (A) That force as a means of redress in international life is lawful, according to international law. (B) That duress has been applied in the matter of treaties so often and with such success in practical results. Nearly every treaty made by a state defeated in war may be said to have been made under compulsion, and of them the number is legion. On the other hand, instances have occurred where a treaty entered into under duress has been disregarded. The writers, confronted with these difficulties, have endeavored to strike a compromise between the municipal law and ethics and the harsh facts of international

Emperor Charles V.; Woolsey, *Int. L.*, 6 ed. (1897) 162. Pope Clement VII. refused to ratify a treaty he had made with the Duke of Ferrara while he was a prisoner; 1 Halleck, *Int. L.*, 4 ed. (1908) 331. Principal persons in France assembled at Cognac after the return of Francis I. from captivity at the hands of Emperor Charles V., declared that the treaty of Madrid which he had been forced to enter into by Charles, was void; 1 Halleck, *Int. L.*, 4 ed. (1908) 329, 331; Vattel, (1758) Chitty's Trans. Book I. §265, says that the latter ought not to have released his prisoner before the States General had approved. In 1811, the Cortez of Spain passed a decree that no engagement should be valid which might be made by Ferdinand during his captivity. Woolsey, *Int. L.*, 6 ed. (1897) 162, says that the treaties made in the above cases by the persons named to regain their liberties were respectively

binding so far as nothing immoral was involved in their articles, and the persons making the treaties did not transcend their powers. This, however, is entirely too refined and ethical a conception for the practical application of international law. Wilson, *Int. L.*, (1910) 195, says, "A state can enter into a perfectly valid contract which has been forced upon it, however disadvantageous its terms may be, provided it does not part with an essential to its existence." The contract must be valid before being forced upon the state, and beyond a certain amount of disadvantage a state cannot enter into a treaty. What is the power which prevents? If this statement is sound, then the South African Republic could not have entered into the treaty with Great Britain at the conclusion of the Boer War, but the fact is that it did enter into such treaty.

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life.¹⁶ By some it has been supposed that in case of duress consent is supposed to have been freely given by way of fiction, which supposition is entirely inadmissible, contrary to the facts, and implies that when consent is not so freely given the result would be otherwise, which is not the case. Others have drawn a distinction and supposed that some treaties imposed by duress are valid; that a treaty destroying a state or impairing its independence is invalid; as one writer expresses it—a state would not be supposed to commit suicide. Neither would an individual, yet he may in fact destroy himself. We may search the international world in vain for any solid basis for the distinction and at most it is a futile attempt to evade the hard facts of international life.

¹⁶ "In international law, force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement. . . . Consent, therefore, is conceived to be freely given . . . so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts;" Hall, *Int. Law*, 6 ed. (1909) 319. See Hershey, *Int. L.*, (1912) 313. That is, the forced consent is a free consent if the amount exacted is no more than somebody supposes the state would freely give if it were willing, which obviously is an identical position and completely begs the question. "By means of a legal fiction, the sovereign defeated in war is also supposed to have freely consented to . . . (the terms) . . . imposed upon him by a treaty of peace;" Hershey, *Int. L.*, (1912) 101n⁶. Why is there a legal fiction, and why confine it to defeat in war? A state may yield to overwhelming force without going to war. See §241, ante, on involuntary transfer. Wheaton, *Elements*, Dana's ed. (1866) 340, says that generally a contract obtained by violence is void

by municipal law, which principle promotes the welfare of society; otherwise the timid would be constantly forced into a surrender of their just rights. That, on the other hand, the welfare of society requires that engagements entered into by a nation under such duress as is implied by military defeat should be held binding, otherwise wars could only be terminated by the utter subjugation and ruin of the weaker party. It is submitted that this somewhat overlooks the true principle involved. Since in municipal affairs the political power of the state curbs violence between individuals, it necessarily follows that violence in obtaining a contract is to be curbed, and the only way to curb that is to permit the other party to escape the obligation upon proving the violence. In the case of international affairs, there is no political power superior to the independent states, and therefore no way to curb violence between them; consequently, a defeated state, or one overcome by superior pressure cannot obtain any assistance and cannot thereafter, unless by its own force, escape from the fulfillment of the treaty which it was compelled to make. Hence the treaty must be observed, not because of any principle of international law, but because

THE PRINCIPLE OF INTERNATIONAL LAW APPLICABLE.

§384. The only conclusion we can reach is that while the international factors of conduct other than self-help may relieve a state in case of duress, they rarely have that effect, and a state in this instance must rely on its own inherent force, otherwise it can have no relief. It is at this point that we are clearly faced with the fact that force rules the international world and that that which is accomplished by force and remains in continuance by force is the fact of that world and must be accepted as lawful by the international lawyer, irrespective of the ethical opinions he may entertain on the

of the stern facts of the case. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 547, says: "A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the parties so represented." But this assumes that a treaty not so concluded is binding, as to which there is a doubt. No case has arisen where a state has, after ratifying a treaty, set up the insanity or intoxication of any of its envoys as an excuse for non-performance. Cases have arisen where before ratification a state has refused to go on, on the ground that the terms were exacted from its envoy under such circumstances. Oppenheim, *Int. L.*, 2 ed. (1912) Vol. 1, 547, says: "It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of the party consenting to the terms of a treaty." This is remote from the point involved. The action of the forced state is not voluntary, and no sophistry can make it so. The municipal law confers a remedy in such case upon the assumption that it was

not voluntary. The absence of remedy in the international world is not to be placed upon the obvious fiction that the act is voluntary, from which it would follow that if it were involuntary there would be a remedy, which is not the case, but upon the obvious fact that although the act is voluntary, there is no remedy for the state forced. Manning, *Int. L.*, 2 ed. Amos. (1875) 124, says that the application of force really qualifies the actual cogency of such treaties, but does not qualify the legal cogency. What is the difference between the two, and is not this adopting the idea of a fiction? Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 7 et seq., says treaties exacted by force are invalid, and that also agreements exacted from a prince by rebellious subjects are void. See Crandall, *Treaties*, 2 ed. (1916) 3 et seq.; Grotius, *Belli, ac. Pacis* (1625), Whewell's *Trans.* II. XIX. XI. XII.; Hall, *Int. Law*, 6 ed. (1909) 319, 320; Martens, G., *Law of Nations*, (1788) Cobbett's *Trans.* II. I. 3; Woolsey, *Int. L.*, 6 ed. (1897) 161 et seq.; 1 Wildman, *Int. L.*, (1849) 140, 141; Wilson, *Int. L.*, (1910) 195; Wilson & Tucker, *Int. L.*, (1901) 210; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IV. 32.

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subject.¹⁷ In the case of a republic or a limited monarchy, there can be no personal duress such as was applied to kings because the treaty can only be made by the constitutional authorities of the state, and it does not seem possible in any of these that pressure could be applied outside the state jurisdiction. Where the state was the property of the king, this jurisdiction resided wherever the king traveled. The only duress, therefore, which can be applied to the case of these modern governments is the case of overwhelming force, threatened or applied, as in the case of a defeat in war. Where agents are sent to negotiate a treaty, they may be subject to some form of compulsion, and if that is discovered by the state which sent them before the treaty has been ratified, there seems to be no reason in principle or justice why the ratification should not be refused, and such seems to be the general opinion.¹⁸

PROTESTS IN TREATIES.

§385. Independent states were formerly in the practice of entering protests in a treaty against provisions which were objected to or omitted. The real facts in such cases probably were that the state protesting was not sufficiently powerful to insist upon its views and was compelled to give way.¹

¹⁷ It has been said, 2 Phillimore, Int. L., 3 ed. (1879-1888) 76, that the surrender of the Spanish Crown under compulsion of Napoleon by Charles IV. and his son, Ferdinand VII., at Bayonne, in 1807, is an instance of the application of duress, which invalidated the surrender and justified the subsequent disregard of it. The subsequent setting aside of the surrender of the crown was only possible because of the overthrow of Napoleon. It was not that the Spanish people were entitled to undo the transaction but that subsequent circumstances made it possible for them to do so. If Napoleon had returned from St. Helena and had been able to seize and maintain his former power, the action of the Spanish people would doubtless have been undone. There is no distinction, therefore, between the resignation of Napoleon at

Fontainebleau and the surrender by Ferdinand VII. at Bayonne, except that in the first case the surrender has remained an accomplished fact in the international world, whereas, in the second case, the party surrendering was able in fact to reacquire the crown surrendered.

¹⁸ "A state may, of course, hold itself justified by political necessity in shaking off such an obligation, but this does not alter the fact that such action is a breach of law;" 1 Oppenheim, Int. L., 2 ed. (1912) 547. Why justifiable if a breach of law?

¹ 1748—The Congress of Aix-la-Chapelle last instance in 18th century in which such protest was made. The Pope has continually protested from the peace of Westphalia (1648) to the Congress of Vienna (1815) against all treaties recognizing or confirming the

ULTRA VIRES TREATY.

§386. Suppose a treaty is made by the officers of the state beyond the powers conferred upon them by the municipal constitution. This would present a case of an ultra vires treaty. Obviously, when there is no such limitation by the municipal law, and the monarch exercises the state power, there can be no question of an ultra vires act because his power is co-extensive with every act which he can perform.²

Effect of War on Treaties.

PRELIMINARY.

§387. The effect of war upon treaties between the belligerents will vary according to the nature of the treaty. We may distinguish—(A) executed treaties, (B) treaty calling for future or continuing performance, which may be (a) general, (b) providing especially for hostilities. A war may be undertaken as a result of a particular treaty, where there is a refusal to perform it coupled with an insistence on its performance by the other side. When the war is over, the parties will, in the treaty they make, confirm old treaties or not, as they see fit, and obviously, while the war is going on, each side will observe such treaties as it thinks necessary. The continuance of any treaty between the belligerents during the war is a mere matter of mutual consent, as is also the revival, abrogation or continuance of such a treaty after the war. Where, however, the belligerents are parties to a general treaty, to which other independent states are parties, then no two of them can, except by force, set the treaty aside or escape from its provisions, by a controversy between themselves, without the consent of the other parties. It is believed that this is all there is to be said upon the subject. The writers have differed in opinion and attempted to lay down a number of rules which seem rather academic and inapplicable to the hard

confiscation of church property affected at or since the time of the Reformation. 1814—King of Saxony protested against dismemberment of his kingdom. 1815—Gustavus IV., ex-King of Sweden, delivered a protest at the Congress of Vienna; 1 Phillimore, *Int. L.*, 3 ed. (1879–1888) 395–396.

² Ayala, *Law of War*, (1582) Carnegie Ed., I. VI. 9. Woolsey, *Int. L.*, 6 ed. (1897) 160, says that "even the most absolute despot may make treaties which neither his subjects nor third powers ought to regard as binding." Notice the word "ought." See §§213n⁷, 240, ante, on ultra vires conveyance.

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facts of international life.³ Since there is no political power superior to the independent states to enforce a treaty in time of peace, it is obvious that in time of war, when external restraints on the action of states are of less effect, treaties will be the less observed. No case has been found where a state has been compelled by any of the rules laid down to continue the obligation of a treaty after the war, and in all cases which have occurred, the treaties have been revived,

³ Table showing the effect of war on treaties to which the belligerents are parties: I. Treaties to which other powers beside the belligerents are parties. (A) Great international treaties: (a) When the war is quite unconnected with the treaty. Unaffected. (b) When the war does not arise out of the treaty but prevents the performance of some of its stipulations by the belligerents. Unaffected as regards the other stipulations, and entirely unaffected with regard to neutral signatory powers. (c) When the war arises out of the treaty. Effect doubtful, depending chiefly on will of neutral signatory powers. (B) Ordinary treaties to which one or more powers beside the belligerents are parties. Effect depends upon subject-matter. Generally suspended or abrogated with regard to third parties. II. Treaties to which the belligerents only are parties. (A) *Pacta Transitoria*. Unaffected. (B) Treaties of alliance. Abrogated. (C) Treaties for regulating ordinary social and commercial intercourse, such as postal and commercial treaties, conventions about property, etc. Effect doubtful. Generally the treaty of peace deals with such matters; if not, it is best to take the stipulations as merely suspended during war. (D) Treaties regulating the conduct of signatory powers towards each other as belligerents or as belligerent and neutral. Brought into operation by war; Lawrence, *Int. Law*, 5 ed. (1913) 365. Westlake, *Int. L.*, 2 ed. (1913) Vol. 2,

32 et seq., says that the general rule is that war abrogates the treaties existing between the belligerents, and their revival, if desired, must be expressly provided for in the treaty of peace except as to (1) Conventional obligations as to what is to be done during a war between the parties; (2) Transitory or dispositive treaties; (3) Treaties establishing arrangements to which third parties are parties, such as guarantees and postal and other unions. On page 33, he cites as examples of dispositive treaties not abrogated by war, the following: (a) Clause in the treaty of 1795 between Great Britain and the United States, giving their respective subjects and citizens the right to hold and transmit land then held by them in the other country notwithstanding alienage. (b) Treaty of 1760 between France and Sardinia (now applying to Italy) relative to the execution in either country of judgments of the other country. (c) Convention of June 12, 1902, and July 11, 1905, relating to certain parts of private international law; that the distinction between abrogation of treaties and suspension of treaties by war is merely a difference of statement, and that treaties of peace seldom fail to stipulate as to what is the intent as to old treaties. See 5 Moore, *Dig. of Int. L.*, (1906) 372-387. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 298, says that the abrogation of treaties by war is preferable as a generalization to their suspension, because fewer exceptions will occur if

if at all, by the consent of the parties.⁴ The notion was formerly entertained that if the war arose in breach of the provisions of the treaty, the latter was thereby annulled, but if the war arose from a

abrogation is taken as the standard. Woolsey, *Int. L.*, 6 ed. (1897) 263, says the stipulations not suspended by war or those lasting are: (1) Those contemplating a state of war; (2) Those declared to be perpetual; (3) Those which imply some state or relation in itself permanent; (4) The same perpetual nature belongs to a compact to regard certain rules of interpretation as part of the law of nations. See Crandall; *Treaties*, 2 ed. (1916) 442 et seq.; 1 Halleck, *Int. L.*, 4 ed. (1908) 314, 315; Hershey, *Int. L.*, (1912) 360; Martens, G., *Law of Nations*, (1788) Cobbett's Trans. II. I. 8; 5 Moore, *Dig. of Int. L.*, (1906) 372-387; 2 Oppenheim, *Int. L.*, 2 ed. (1912) 129, 130; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 792-811; Twiss, L., *of Nations, Peace*, 2 ed. (1884) 442; Walker, *Science, Int. L.*, (1893) 326 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 352.

⁴ Austria was bound by the Barrier Treaty with the United Netherlands to admit Dutch garrisons into the fortresses which were to serve as a defence against France. The greater part of the fortresses were demolished in the War of the Austrian Succession. The question was whether the obligation of Austria still remained. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 3, 792, 793, refers to the case. He says Austria destroyed the fortresses in 1781. "Thus the Treaty of Peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United

States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined, that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions;" Wheaton, *Elements*, Dana's ed. (1866) 341. As to the effect of the War of 1812 on the third article of the Treaty of 1783 between Great Britain and the United States relating to Newfoundland fisheries, see Crandall, *Treaties*, 2 ed. (1916) 443-446; Wheaton, *Elements*, Dana's ed. (1866) 342-350. It has been decided that Art. 9, of the Treaty of November 19, 1794, between Great Britain and the United States, was not annulled by the breaking out of the War of 1812; 5 Moore, *Dig. of Int. L.*, (1906) 372; 2 Oppenheim, *Int. L.*, 2 ed. (1912) 130n¹; 2 Westlake, *Int. L.*, 2 ed. (1913) 33n². As to effect of War of 1812 on private rights, under Art. VI. of the Treaty of 1783, and Art. IX. of the treaty of 1794, between United States of America and Great Britain, see

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Society for the Propagation of Gospel, etc., vs. New Haven, et al, 8 Wheat. (1823); 464 Crandall, *Treaties*, 2 ed. (1916) 446. A treaty calling for continuing performance may be suspended by war, but an honorable state will continue performance after the war. See example of Spain in continuing performance of Treaty of February 17, 1834, of Madrid, calling for the payment of annual sum in settlement of certain claims of American citizens, after the war with United States in 1898; Crandall, *Treaties*, 2 ed. (1916) 447, 448; 5 Moore, *Dig. of Int. L.*, (1906) 376-380. 1856—After war of, Russia and Sardinia, by special treaty renewed the obligation of the treaties which had been abrogated by the war. See account of debate in the House of Lords, 1801, upon the peace of Amiens, wherein each speaker impliedly or expressly admitted the abrogation of treaties by the breaking out of the war; 3 Phillimore, *Int. L.*, 3 ed. (1879-1888) 804. See case of Great Britain continuing during the Crimean War the payments to Russia in the Russian-Dutch loan; Crandall, *Treaties*, 2 ed. (1916) 448-449. By the Treaty of Paris, which ended the Crimean War, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were removed or replaced by fresh agreements, trade should be carried on on a footing of regulations in force before the war, and the subjects of the belligerent states should be treated as between those states as favorably as those of the most favored nation. 1859—Treaty of Zurich. Austria and Sardinia confirmed all treaties in vigor upon the commencement of the war of that year. As between Austria and France no revival or confirmation of treaties was stipulated although agreements of every kind existed between them. 1866—Treaty of Vienna between Aus-

tria and Italy confirmed afresh the Treaty of Zurich. The Treaty of Prague revived, or, in other words, restipulated all the treaties existing between Prussia and Austria so far as they had not lost their applicability through the dissolution of the Germanic Confederation. 1871—The Treaty of Frankfort revived treaties of commerce and navigation, a railway convention having reference to the customs, copyright, conventions and extradition treaties without mentioning any other treaties by which France and Germany were bound to each other; Hall, *Int. Law*, 6 ed. (1909) 380, 381. 1871—The Treaty of Peace of Frankfort between France and Germany, and of Portsmouth (1905) between Japan and Russia, placed the commercial relations of the former belligerents on the footing of the most favored nations class pending the negotiation of new conventions; Hershey, *Int. L.*, (1912) 361n⁴. 1895—The Treaty of Peace between China and Japan of May 18, 1895, Art. VI. provided: "All treaties between Japan and China having come to an end in consequence of the war, China engages immediately upon the exchange of ratifications of this act to appoint plenipotentiaries to conclude with the Japanese plenipotentiaries a treaty of commerce and navigation and a convention to regulate frontier intercourse and trade; Wilson & Tucker, *Int. L.*, (1901) 215. 1898—Spain, at the outbreak of the war with the United States of America, declared all treaties with the United States cancelled. United States of America called attention of Spain to Article XIII. of Treaty of 1795, providing for withdrawal of merchants in case of war. Spain refused, however, to make any arrangement; Crandall, *Treaties*, 2 ed. (1916) 449, 450; 5 Moore, *Dig. of Int. L.*, (1906) 372; 2 Oppenheim, *Int. L.*, 2 ed. (1912) 129n⁶; Wilson & Tucker, *Int.*

cause independent of the treaty, the so called rights acquired by such treaty would still subsist.⁵

EXECUTED TREATIES.

§388. When the treaty is executed on both sides, as a boundary treaty or a cession, the war will obviously have no effect because it is *functus officio*.⁶ The war may result in a change of the facts resulting from the performance of the treaty, as a change in the boundary. In such case, however, it is not the treaty which is affected but the state of facts resulting from the performance of the treaty.

Executory Treaties.

GENERAL.

§389. If the treaty calls for continuous or future performance on each side of some matter unconnected with the war, as a treaty of extradition, the performance of the treaty will obviously be interrupted and may or may not be renewed after the termination of hostilities. The question of such renewal will be entirely within the discretion of the warring parties. It may be provided for in the treaty of peace which concludes the hostilities, or it may not. As the circumstances which give rise to the treaties will obviously recur at the termination of the war, the states concerned will generally provide for continuing the performance unless there is some special reason to the contrary arising out of the war.

TREATIES PROVIDING FOR HOSTILITIES.

§390. If the treaty is made purely for the event of hostilities, it may or may not be observed by the belligerent parties. This is entirely a matter in their discretion, and it frequently happens that warring powers will disregard treaties which they think are not to their advantage in carrying on the hostilities.⁷

L., (1901) 215. 1905—The Treaty of Portsmouth, which concluded the Russo-Japanese War, did not renew, confirm or revive a single treaty; Hall, Int. Law, 6 ed. (1909) 381. "The Effect of War on Public Debts and on Treaties: The Case of the Spanish Indemnity," J. B. Moore, 1. Col. Law Rev. 209 et seq.

⁵ Grotius, Belli. ac. Pacis (1625),

Whewell's Trans. III. XX. XXVII. XXVIII.; Vattel, (1758) Chitty's Traps. Book IV. §42. This view is now obsolete; Wheaton, Elements, Dana's ed. (1866) 353n.

⁶ Crandall, Treaties, 2 ed. (1916) 443.

⁷ Crandall, Treaties, 2 ed. (1916) 449, says they are binding on the parties during the war.

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Effect of Changes in State Life

Effect of International Appearance and Disappearance of States***PRELIMINARY.**

§391. The international appearance and disappearance of a state must be considered with reference to the effect on treaties.⁸ We have several cases: (A) the appearance of a state by breaking off from an existing state and the effect on the treaties of that state; (B) the disappearance of a state into another state or states and the effect on the treaties of the state which has disappeared and the treaties of the state into which it disappears. The transfer of state territory is to be distinguished, as here the two states retain their status in the international world and the only question is how far the obligation of any treaty to which one of them is a party goes with the transfer of the territory. If the treaty is executed, no question will arise, as there is nothing to be done under it by either party.⁹ The discussion will therefore relate entirely to executory treaties.¹⁰ We shall discuss first the appearance of a state, and then the disappearance.

EFFECT OF INTERNATIONAL APPEARANCE OF A STATE ON A TREATY.

§392. Where a state appears for the first time on the international horizon, it is perfectly clear that it is not bound by any treaties which have previously been made between any of the before-existing international persons, as it was not a party to them. It obviously cannot be bound except by treaties which it enters into itself. A question may arise how far the obligation of any treaty made with the state from which it seceded, if any, is binding on it, if the terms of that treaty clearly refer to the territory embraced in the new state. Ordinarily a new state is anxious to stand well with the other international parties and therefore will take a reasonable view and voluntarily assume obligations which seem to apply to its new status.

* The distinction between international appearance and disappearance and appearance and disappearance in fact has been discussed. See §65 et seq., ante, but is generally overlooked.

⁸ See §373, ante, on distinction between executed and executory treaties.

¹⁰ Many writers, e. g., Hall, *Int. Law*, 6 ed. (1909) 91, confuse with treaties

the question of succession to property or territorial rights, both of which, however, are clearly to be distinguished. Crandall, *Treaties*, 2 ed. (1916) 425, in discussing change of state entity, says the obligation of a treaty comes to an end with the extinguishment of one of the contracting parties with consequent loss of power to perform.

The question, however, is entirely one of voluntary action of the state concerned.¹¹

EFFECT OF INTERNATIONAL DISAPPEARANCE OF A STATE ON A TREATY.

§393. Where one state merges into another, the state merging disappears from international life, and the treaties which it has made with other states will be of no effect because the party obligated to perform has ceased to exist. Any performance, if it is to continue in effect, will have to be undertaken by the state into which the merger takes place. Ordinarily, the treaties of the latter will cover most of the matters regulated by the treaties of the disappeared state. Where a state is merged into another, the treaties of the state into which the merger takes place may be affected, and such a merger may involve a violation of a treaty. If so, it is the same as any other violation, as the merger was the result of the act of the state into which the merger takes place. In nearly all these cases the treaty obligations have been taken care of by provisions of the parties at the time.¹² Where a state breaks up into component parts, as

¹¹ Crandall, *Treaties*, 2 ed. (1916) 434, states the principle that a state formed by separation from another entirely apart from the continuance or non-continuance of the existence of the state from which it separates, succeeds to such treaty burdens of the parent state as are permanent and attached to the territory embraced in the new state, and cites several cases. No case has been found of any resort to force to enforce such a treaty and the matter is usually regulated by agreement between the parties, the external factors of reason, public opinion and the demands of self-interest.

¹² Both Sweden and Norway have signified their desire that treaties concluded in common by the two countries during the union should be considered as remaining valid until formally disclaimed, Norway retaining no responsibility for Sweden, and vice-versa; Crandall, *Treaties*, 2 ed. (1916) 438; Hall, *Int. Law*, 6 ed. (1909) 335n². 1866—On the incorporation of the

Kingdom of Hanover into Prussia, the Hanoverian treaties of amity, commerce, navigation, extradition and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects. 1 Rivier, 73, quoted in 1 Westlake, *Int. L.*, 2 ed. (1910) 60, 84. See Crandall, *Treaties*, 2 ed. (1916) 426. When Texas was incorporated into the United States, England and France hesitated to admit that their commercial treaties with the latter had fallen to the ground; 1 Westlake, *Int. L.*, 2 ed. (1910) 60. On annexation of Madagascar by France, England and United States admitted that they could no longer claim the benefit of the Malagasy tariffs which had been arranged by conventions between them; 1 Westlake, *Int. L.*, 2 ed. (1910) 60, 84. 1871—After the incorporation of Naples in the Kingdom of Italy, it was decided by the courts both in Italy and France that a treaty of 1760 between France and Sardinia, relative to the execution of judgments

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of the tribunals of the one power within the territory of the other, was applicable to the whole Italian State; Crandall, *Treaties*, 2 ed. (1916) 426; Hall, *Int. Law*, 6 ed. (1909) 99 and 21n¹. "The separation of Belgium from the Kingdom of the Netherlands, and the change wrought thereby in the relations of Holland with the great powers, were held by the United States to justify in withdrawing from an agreement to accept the King of the Netherlands as an umpire on the Northeastern boundary question. When Texas agreed to unite itself to the Republic of the United States, France and England notified her that she did not thereby cease to be bound by her treaty obligations with those powers;" Wheaton, *Elements*, Dana's ed. (1866) 48n¹⁷. The annexation of the two Dutch Republics by the British Government in 1900 raised several questions as to the obligation of the absorbing state; Hall, *Int. Law*, 6 ed. (1909) 100n¹. For provisions of the text of the Declaration of Japan as to Treaties of Korea upon merger of the latter state with Japan in 1910, see 1 Oppenheim, *Int. L.*, 2 ed. (1912) 128n¹; 4 American J. Int. L., Supp. 280 et seq. Wheaton, *Elements*, Dana's ed. (1866) 44, 45, says that personal treaties relating to the persons of the contracting parties came to an end at the death of the king or the extinction of his family, but that real treaties, being those relating to subject matters of the convention independently of the contracting parties, continue to bind the state, whatever intervening changes may take place in its internal constitution or rulers, except where the treaty relates to the form of government itself and is intended to prevent any such change in the internal constitution of a state. The Austrian United Provinces, after independence, claimed the benefit of the treaties of navigation concluded between Austria and Great Britain and

Austria and Denmark while they were a part of Austria's dominions and the contention was rejected by Great Britain and Denmark; 1 Wildman, *Int. L.*, (1849) 173. Phillimore, *Int. L.*, 3 ed. (1879-1888) Vol. 3, 793, says the of treaties Poland after the partition, and those of the Crimea after its subjugation by Russia in 1783, ceased to exist except as transitory treaties. As to distinction between executed and executory treaties, see §373, ante. The United States of America on recognizing Texas as a dependent state, assumed that the treaty of amity, commerce and navigation concluded between the United States of America and Mexico on April 5, 1831, as mutually binding on the United States of America and Texas; Crandall, *Treaties*, 2 ed. (1916) 437. 1866—Upon the incorporation of Nassau and Hanover into Prussia, the United States of America considered the treaties with those powers relating to extradition, commerce and navigation and the convention abolishing the droit d'aubain and emigration taxes as at an end; Crandall, *Treaties*, 2 ed. (1916) 426. 1860—For the case of the treaties with minor Italian States merged on formation of the Kingdom of Italy, see Crandall, *Treaties*, 2 ed. (1916) 426. 1895—On the French occupation of Madagascar, France declared treaties between the United States of America and Madagascar as to capitulations at an end, and extended French law to the Island; Crandall, *Treaties*, 2 ed. (1916) 427. As to continuance in force of the treaties with Prussia on formation of the new German Empire in 1871, see Crandall, *Treaties*, 2 ed. (1916) 431-433. There has been a difference of opinion as to the effect of extinction of a state on the obligation of treaties. For references to the views of some of the writers, see 1 Westlake, *Int. L.*, 2 ed. (1910) 67n¹.

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where there is a dissolution of a union or a confederacy, or the state is forced out of international existence by other states, as in the case of Poland, there is a complete disappearance of one of the parties to the treaties which such state may have made, and nobody who can be called upon for performance is in existence. The treaties of such a state, therefore, may well be said to fall to the ground.

An analogous case arises in municipal law, where there is a purely personal contract, as for services, and the party agreeing to render the service dies. There does not seem to be any principle under which the states disappearing can be called on to fulfill any treaty obligations which it had previously incurred.

EFFECT OF CHANGE OF GOVERNMENT ON TREATIES.

§394. Where there is a change in the government of the state, as the succession of a new king, or any other internal modification, there seems to be no reason why the obligation of the state should not continue. Changes in the municipal law have no effect upon the external aspect of the state. A difficult case occurs where a government is totally extinguished by anarchy, as, for instance, the French Revolution, and a new government arises.¹³ When the organ of government of the state was the prince, the treaty appeared in the guise of a personal contract and a distinction was drawn between real and personal treaties, and the question debated whether the successors of the potentate were bound. This question is now less material in view of the continuing corporate form of modern limited governments.

EFFECT OF TRANSFER OF STATE TERRITORY, VOLUNTARY OR INVOLUNTARY, ON TREATIES.

§395. Where one state cedes part of its territory to another, the question has been raised as to the effect, if any, of such cessions upon the treaty obligations of the state ceded. By analogy to the municipal law, it seems clear that if the treaty relates solely to the territory ceded, as a treaty of boundary, or the performance of the treaty calls for the doing of an act on the ceded territory, then the state to which the property is ceded should assume the obligation

¹³ Charles II. on succeeding, acknowledged binding force of all the treaties concluded during the time of the Republic; 2 Phillimore, *Int. L.*, 3 ed. (1879-1888) 29. See Ayala, *Law of*

War, (1582) Carnegie Ed., I. VII. 10; Crandall, *Treaties*, 2 ed. (1916) 423 et seq.; Zouche, *L. of Nations* (1650), Carnegie ed., Part. II. IV. 29.

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Third Parties

of further performance, and also it seems clear that such cession would have no effect upon the general treaties of the ceding state having no relation to the territory ceded. A case might arise where one treaty covered both cases and it would be difficult to separate the various provisions. If the provisions were separable, the case is clear; if not, the matter would have to be adjusted by the consent of the contracting parties. While this question has been discussed at length by the writers, no case appears to have arisen in practice involving any controversy in such a case. It seems that the habitual conduct of state has been such as to prevent any difficulties arising. It will probably rarely occur that any cession of territory will affect a treaty obligation.¹⁴ Where territory is acquired by force, it seems clear that there can be no obligation resting on the acquiring state by reason of the treaties to which the state conquered was a party or to which it was subject.¹⁵

TREATIES AND THIRD PARTIES.

§396. The question whether a treaty binds third parties is doubtful, if there is a question as to whether the treaty binds the parties to it. Treaties may have an effect on third states and their members. The question arises whether a state may acquire an interest under a treaty made between other states.¹⁶ Accession

¹⁴ Crandall, *Treaties*, 2 ed. (1916) 430 et seq.

¹⁵ An analogy in the municipal law is the case where property is acquired by eminent domain. In such case all mortgages and judgments and encumbrances upon the property condemned are discharged and they are thrown upon the proceeds for payment, and the title acquired by eminent domain is clear of any such encumbrances. The stipulation in the treaty of cession of Louisiana for the protection of the inhabitants and their property ceased to be applicable when Louisiana was admitted into the union, 5 Moore, *Dig. of Int. L.*, (1906) 356. because those inhabitants thus became members of the community of the United States Government. As to controversy between United States of

America and Germany over application of treaties with German States to the provinces of Alsace-Lorraine, see Crandall, *Treaties*, 2 ed. (1916) 430; 1 Moore, *Dig. of Int. L.*, (1906) 386, 387.

¹⁶ Hall, *Int. Law*, 6 ed. (1909) 338, says that a treaty may affect third parties. If a state of things is thereby brought into existence which other countries are bound to respect, then so long as it is lawful or consistent with the safety of states not parties to it, other states must not prevent or hinder the contracting parties from carrying it out. Treaty by an independent state affecting a state dependent upon it does not make such dependent state a party to the treaty; 1 Oppenheim *Int. L.*, 2 ed. (1912) 568n¹. The Hay-Pauncefote Treaty between Great Britain and the United States in 1901, and the Hay-

means (a) the formal entrance of a third state into an existing treaty so that such state becomes a party to the treaty, with all the rights and duties arising therefrom, or (b) the entry of a state into a treaty between other states for the purpose of guarantee.¹

INTERPRETATION OF TREATIES.

§397. The interpretation of treaties is a matter of construction and a discussion of it will be omitted. There is a great deal of information to be gleaned from the various arbitrations which have taken place and from the writings of the authors as to what interpretations have been in fact placed upon clauses of particular treaties, and what rules, if any, are to be laid down as applicable to the subject. In the note we have referred to the discussion of some of the authors on the subject.²

Varilla Treaty between the United States and Panama of 1903, provided that the Panama Canal shall be open to vessels of commerce and war of all nations, although Great Britain, the United States and Panama are the only parties. 1881—Boundary Treaty of Buenos Ayres, Sec. 5, provides that the Strait of Magellan shall be open to vessels of all nations although Argentine and Chile are the only parties. 1856, March 30—Treaty of Paris annexe to the Peace Treaty of Paris in 1856, provides that Russia shall not fortify the Aland Islands, to which only Great Britain, France and Russia are parties, although the provision was made in the interest of Sweden. 1911—Great Britain contemplated entering into a treaty of general arbitration with the United States of America. She previously notified Japan of her intention on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance, Article 4 of which provides that the alliance shall never concern a war with a third power with whom one of the allies may have concluded a treaty of general arbitration; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 564, 565.

¹ 1 Oppenheim, *Int. L.*, 2 ed. (1912) 568, 569. "Adhesion is * * * * such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty."

¹ Oppenheim, *Int. L.*, 2 ed. (1912) 569. "International Conventions and Third States," (1917) Ronald F. Roxburgh, 12 *Amer. J. Int. Law* 222 et seq.

² Hall, *Int. Law*, 6 ed. (1909) 327-333; Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 293n¹, says that Hall is copious on the subject and that his discussion of it and the cases to which he refers afford much matter for reflection. See Crandall, *Treaties*, 2 ed. (1916) 358 et seq.; Grotius, *Belii. ac. Pacis* (1625), Whewell's *Trans.* II. XVI.; 5 Moore, *Dig. of Int. L.*, (1906) 249 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 582 et seq.; Wheaton, *Elements*, Dana's ed. (1866) 365 et seq.; Wilson & Tucker, *Int. L.*, (1901) 212; Wilson, *Int. L.*, (1910) 199 et seq.; 1 Wildman, *Int. L.*, (1849) 177, et seq.; Woolsey, *Int. L.*, 6 ed. (1897) 173 et seq. Westlake, *Int. L.*, 2 ed. (1910) Vol. 1, 293, 294, thinks that the various rules suggested by the writers are not likely to be of much

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Law-Making Effect

EFFECT OF TREATY ON INDEPENDENCE OF A STATE.

§398. A state may by treaty limit itself to certain acts, and there is no more ground to say that a nation thereby impairs its independence than to say that an individual by binding himself to do a certain thing loses his independence although in each case there is, to that extent, a restriction on freedom of action. Contracts may, however, be of such a nature as to extinguish personal independence, and the same is true of a treaty. The question is, when does the binding effect of the promise cover the entire activity of the individual or state or so interfere with it as to prevent any freedom of action whatever. A treaty may result in the merger of one state with another or its complete extinguishment; in the same way a state may also terminate its independence by treaty.³

LAW-MAKING EFFECT OF A TREATY.

§399. A treaty, as a contract between the parties, does not affect a third state. A great number of treaties between different states on the same matter might indicate a prevailing necessity of that particular rule of conduct or an opinion that it should prevail. On the other hand, the circumstance that the parties thought it necessary to make an agreement indicates that without the agreement there would be no compulsion to act. In the municipal law no court would reason that a rule of law existed from a larger number of contracts having been made and then impose the rule on an individual who has not made such a contract. The question turns on the meaning to be given to the word "law." The treaty in so far as it is performed or its obligation observed determines conduct and therefore is in a measure an external factor determining international conduct.⁴

practical use, and he very cogently points out that rules of interpretation borrowed from the English common law, and applied to the minute drafting of English documents, are not properly applicable to treaties where such minute provisions are generally impracticable, and that in these cases a very liberal rule of interpretation should be adopted. As to meaning of "most favored nation" clause, see 5 Moore, *Dig. of Int. L.*, (1906) 257-319; 1 *Cobbett Cases*, 3 ed. (1909) 328 et seq.

³ Hall, *Int. Law*, 6 ed. (1909) 23;

1 Oppenheim, *Int. L.*, 2 ed. (1912) 181-184; Vattel, (1758) Chitty's Trans. Book I. §5. See §365, ante, on treaty distinguished from a federal constitution.

⁴ See Hall, *Int. Law*, 6 ed. (1909) 7-12; Lawrence, *Int. Law*, 5 ed. (1913) 28-45; Manning, *Int. L.*, 2 ed. Amos. (1875) 86 et seq.; 1 Oppenheim, *Int. L.*, 2 ed. (1912) 587 et seq.; 1 Phillimore, *Int. L.*, 3 ed. (1879-1888) 45-53; Twiss, *L. of Nations, Peace*, 2 ed. (1884) 164 et seq.; 2 Ward, *Hist.*, (Dublin, 1795) 139-143. Twiss, *War*, 2 ed. (1875) 382, points out that the

TIME OF TREATY GOING INTO EFFECT.

§400. A treaty usually specifies the time at which it is to go into effect if it is carefully drawn.⁵ Where there is no such provision, there is a difficulty as a treaty is not a complete document until ratification and there may be a question as to the effect of the treaty between the date of the signing and the ratification. Therefore, where no time is specified, there is room for implication, and it has been supposed by some that in such case the treaty goes into effect at the date of signing, by others upon the exchange of ratifications.⁶ It is sometimes supposed that an exchange of ratifications has a retroactive effect. The usual custom is to refer to the treaty as of the date when it is first signed.

ancient world seemed to have leaned to the view that all international law was derived from treaty, and that there was no satisfaction to be made to a foreigner unless he was a confederate. See §120, ante, on treaties as a source of international law.

⁵ Wilson, *Int. L.*, (1910) 208.

⁶ Crandall, *Treaties*, 2 ed. (1916) 343 et seq.; Hall, *Int. Law*, 6 ed. (1909) 326; Hershey, *Int. L.*, (1912) 314; 5 Moore, *Dig. of Int. L.*, (1906) 244; Wilson, *Int. L.*, (1910) 208; Woolsey, *Int. L.*, 6 ed. (1897) 171; Wheaton, *Elements*, Dana's ed. (1866) 336; Zouche, *L. of Nations* (1650), Carnegie ed., Part II. IX. 23. In a number of cases the United States Supreme Court has applied the rule that a treaty goes into effect on its date. *Davis v. Police Jury of Concordia*, 9 Howard, 280 (1850); *Treaty of St. Ildefonso of October 1, 1800*, by which Spain ceded Louisiana to France; *United States v. Reynes*, 9 Howard, 127 (1850). 1919, June 28—Peace Treaty of Versailles, Article 440, provided: "The present Treaty, of which the French and English texts are both authentic, shall be ratified. The deposit of ratifications shall be made at Paris as soon as possible. Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Govern-

ment of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible. A first proces-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand. From the date of this first proces-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty. In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification. The French Government will transmit to all the signatory Powers a certified copy of the proces-verbal of the deposit of ratifications. IN FAITH WHEREOF the above named Plenipotentiaries have signed the present Treaty. Done at Versailles, the twenty-eighth day of June, One thousand nine hundred and nineteen, in a single copy which will remain deposited in the archives of the French Republic, and of which authenticated copies will be transmitted to each of the Signatory Powers."

TERMINATION OF TREATIES.

§401. The phrase "termination of treaties" is used by the writers in a very loose and unsatisfactory way, and they speak of the extinction or expiration of treaties in a somewhat synonymous sense.⁷ In the note we have appended the analysis furnished by several of the writers.⁸ It appears that an executed treaty is sometimes spoken of as a terminated treaty, and also as an extinct treaty. It is submitted that a treaty can only be said to expire when so provided by its terms. If there is no time limit fixed by the treaty, and it calls for continuing performance, it must remain in full force forever, unless the parties mutually agree otherwise. If the treaty provides for a time limit, after which performance is to cease, then it may be said to expire at the time fixed. A continuing treaty may also come to an end when the performance becomes impossible,

⁷ Crandall, *Treaties*, 2 ed. (1916) 423 et seq.; 5 Moore, *Dig. of Int. L.*, (1906) 319 et seq.

⁸ "A treaty may expire in accord with the terms of the treaty agreement, or may be dissolved, may become void or voidable, or may be annulled;" Wilson, *Int. L.*, (1910) 209. "Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory;" Wheaton, *Elements*, Dana's ed. (1866) 353. See 1 Cobbett Cases, 3 ed. (1909) 321 et seq. Treaties in general come to an end under the following conditions: (a) The complete fulfillment of all the treaty stipulations terminates a treaty. (b) The expiration of the time limit for which the treaty agreement was made puts an end to the treaty. (c) A treaty may be terminated by express agreement of the parties to it. (d) When a treaty depends upon the execution of conditions contrary to the principles of international law or morality, or impossible of performance, it is not effective. (e) A state may renounce the advantages and rights secured

under a treaty. (f) A declaration of war may put an end to those treaties which have regard only to conditions of peaceful relations, and suspend treaties which have regard to permanent conditions. (g) Is voidable when: (1) Concluded in excess of power of contracting parties; (2) When it is concluded because of stress of force upon negotiators or because of fraud. (3) When the conditions threaten the self-preservation of the state or its necessary attributes. (h) A treaty may be terminated by simple act of denunciation; Wilson & Tucker, *Int. L.*, (1901) 214-216. For a discussion of the effect of the notice given by the President of the United States to terminate the terms of the treaty of 1854 relative to the New England coast fisheries, which notice was given by the President in pursuance of Act of Congress of January 18, 1865, U. S. Laws, Vol. 13, 566, see Wheaton, *Elements*, Dana's ed. (1866) 350. For discussion of the municipal law of the United States of America as to the proper organ of government to give this notice, see Crandall, *Treaties*, 2 ed. (1916) 458 et seq.

or there is a valid excuse for non-performance, or one of the parties successfully maintains a breach. A treaty, therefore, becomes fully performed or else if it calls for continuance it continues until otherwise provided. The word "termination" is only properly applicable to the ending of some continuing thing—the termination of a debate or the termination of the building of a railroad. Now, in international relations, we have two broad classes of treaties in which the same distinction exists as in municipal law, but it is not of the same prominence. This distinction is that between treaties immediately performed by one act and treaties calling for continuous performance of successive or repeated acts, extending over a period of time.

RENEWAL OF A TREATY.

§402. The idea of the renewal of a treaty is only proper in the case of a treaty providing for continuing performance and which treaty has or is about to come to an end.⁹ Here the parties may agree upon further performance under a renewal of the old treaty, or upon performance under a new treaty. An executed treaty obviously cannot be renewed, as the performance has been complete and the treaty extinct. The only way a new agreement will affect such a transaction is by providing for the undoing of that which was done under the former treaty, but nothing can ever operate to perform again the act which already has been done. The majority of treaties between independent states are continuing treaties, that is, call for continuing performance extending over a long period of years.¹⁰

⁹ "Renewal of treaties is the term for the prolongation of such treaties before their expiration as were concluded for a definite period of time only;" 1 Oppenheim, *Int. L.*, 2 ed. (1912) 580; Hall, *Int. Law*, 6 ed. (1909) 352.

¹⁰ Grotius, *Belii. ac. Pacis* (1625), Whewell's Trans. II. XV. XIV., says, "When the time is ended, the treaty ought not to be tacitly supposed renewed, except by acts which receive no other interpretation; for a new obligation is not lightly presumed." Martens, G., *Law of Nations*, (1788) Cobbett's Trans. II. I. 9, says treaties are renewed when (1) New sovereign

comes to throne, when it is customary to make declaration confirming treaties made with predecessor. (2) When treaty of peace is made, it is customary to renew treaties suspected of having been violated during the war. (He means violated by the war, that is, suspended by war.) A treaty violated during the war stands on a somewhat different footing, but a treaty not so expressly renewed at the peace is not necessarily invalidated. A treaty between France and Spain on October 1, 1800, expressly confirmed the treaty of August 18, 1796. For quotation from the text, see Wilson, *Int. L.*, (1910) 213.

§403

Summary

SUMMARY.

§403. A treaty occupies very much the same place in international law that a contract does in municipal law, but although there is a strong analogy between the two, it is not to be pushed too far. The principal distinction lies in the difference in the remedy, in the circumstance that in international life there is no superior political power to afford redress for breach of a treaty.¹ A distinction which is of particular importance in this branch of our subject as the judicial cognizance of contracts has given rise in the municipal law to a refinement and complexity of doctrine which is entirely inapplicable in international relations, a circumstance, however, which is frequently overlooked by the writers.

A treaty may be defined as a formal agreement between two or more independent states, to do or not to do a particular thing.² Although the usual practice is to reduce a treaty to writing, there is no principle which requires the transaction to appear in this form. Treaties were universally in the Latin language until the middle of the seventeenth century, after which French was employed. The modern usage is for states having different languages to have their treaties drawn up in the language of each in parallel columns. The force of custom and precedent generally results in a certain formal arrangement of the words of the treaty, and in the use of terms. There is, however, no fixed rule governing the form. Treaties are entered into by plenipotentiaries appointed for that purpose, that is, principals purporting to have full authority, and not in the names of the monarchs or states who are the real parties to the treaty. This was the form adopted at an early date, and there has been no change, although the use of this method has resulted in certain unfortunate difficulties. If the treaty were made directly in the names of the states as principals, as contracts between corporations in municipal life, there would be a great gain in simplicity and directness in international affairs.³

There were few treaties in early times, principally because there were few subjects concerning which treaties were made. In a state of rude civilization and continued fighting, the only object of a treaty was to arrange for a suspension of hostilities and accordingly treaties universally appeared in the beginning as truces for the termination of war. With increase in civilization and commerce, growth of wealth and the middle classes, subjects arose which required the

¹ See §340, ante.

² See §341, ante.

agreement between states other than military matters, and accordingly we find the number and variety of treaties constantly increasing with advance in civilization.³

The discussion of the formation of the treaty involves the several topics of (A) capacity of the parties, (B) state act of exercising the treaty-making function, (C) the negotiation, (D) the execution and ratification.⁴

There is no physical incapacity pertaining to a state, as the case of insanity or minority in municipal life. So far as the factors of international conduct operate to restrain the exercise of the treaty-making function, a question of legal capacity may arise even in the case of a state, and as to which we may distinguish independent states, belligerent states, neutralized states, dependent states.⁵

An independent state has full power by virtue of its inherent force and existence as a living organism, to enter into a treaty. When the government of the state is paralyzed or has disappeared, there is a temporary incapacity of the organ of state.⁶

The notion that an independent state could not make a treaty with (a) a state professing a different religion, (b) a state not a member of the family of nations, (c) barbarous states, is now obsolete. The notion formerly obtained, when the princes of Western Europe formed a small and exclusive community, that treaties could not be made with potentates outside of the charmed circle of the family of nations, and particularly could not be made with infidel and barbarous states. The notion, however, only went to the extent of giving these so-called "Christian" princes an excuse for breaking their word to such a state whenever they felt able, and did not keep them from making treaties whenever forced to do so. When the Ottoman Porte conquered a large part of Europe, the conquered princes did not feel any religious scruples about obtaining concessions by treaties from their formidable antagonist. Traces of this notion are still to be found in the writers. States now enter into treaties with uncivilized kings, savages, and all kinds of communities having independent existence, whenever it is desirable or necessary to do so.⁷

A belligerent community is a state, as we have seen, in the making, and may exercise the treaty-making function as soon as any other state is willing to enter into such relations with it. If the community succeeds in maintaining its independence the treaties so

³ See §342, ante.

⁴ See §343, ante.

⁵ See §344, ante.

⁶ See §345, ante.

⁷ See §345, ante.

made will have the same force and effect as other treaties. If the community is unsuccessful and the parent state reasserts its control, the treaties which it has made will obviously fall to the ground, or be only of such effect as the parent state may elect. Any independent state, therefore, enters into a treaty with a belligerent or insurgent community solely at its risk of whether the treaty turns out valid or not.⁸

A neutralized state may enter into a treaty except in so far as the making or performing of the treaty involves a departure from the status of neutrality. This is so because the only restraint on the international action of such a body is the neutralization imposed by external political power, and even though the terms of the neutralization may not expressly prohibit the making of a treaty, the implication of the prohibition of the exercise of such a function in violation of the neutrality seems clear.⁹

A dependent state cannot make a treaty unless the municipal law permits it to exercise such international functions.¹⁰

The making of the treaty is a state act, involving action of the proper state organs, which are determined by municipal law, as the ones appropriate to exercise that function.¹¹

Each independent state is fully competent, by virtue of its inherent power as a state, to make a treaty and when the writers speak, as they generally do, of a right to make a treaty, the word "right" can only be used in the sense of "power."

The questions of assent and consideration which cause so much difficulty in municipal law are practically unknown in the international world. The government of the state is in the first place the organ which exercises the state functions, and those branches or departments of the state prescribed by the municipal law exercise the particular and special function of treaty making.¹²

In autocracies the treaty-making power, just as other state powers, was vested in and exercisable only by the monarch. The power therefore was a purely personal one, and the treaty was regarded very often as a personal obligation of the potentate who ruled the state.¹³

In democracies and limited governments the municipal law generally prescribes the officer of state charged with the duty of making treaties and that power is generally divided between two or more

⁸ See §346, ante.

⁹ See §347, ante.

¹⁰ See §348, ante.

¹¹ See §350, ante.

¹² See §350, ante.

¹³ See §351, ante.

branches, the concurrence of both being necessary in order to bind the state. This provision has been found necessary owing to the vast importance of the treaty-making power and the great damage which may be inflicted upon a state by an ill-considered or improper treaty. The further consideration of this question is purely a matter of municipal law.¹⁴

The terms of the treaty are arrived at by negotiation between the states concerned, which negotiations are carried on by the officials of the state charged with intercourse with other states, and which have been fully discussed in a previous chapter. Treaties are, however, usually negotiated by special envoys, and not by the regular envoys maintained at foreign capitals. The special envoys meet at some designated place, exhibit their powers to conduct negotiations, and proceed to settle upon the terms of the treaty.¹⁵ When they have agreed, the result of the negotiations is set down in a document which is called sometimes a draft of treaty, and which the plenipotentiaries sign in their own names as principals acting under full powers from their respective principals.¹

Ratification is the act by which the state signifies its approval of the treaty which has been executed by its negotiator.²

Among autocrats the conferring of full powers resulted necessarily in the treaty on the face being a complete binding document, and nothing further was necessary in order to constitute it a full obligation of the contracting parties. The practice, nevertheless, was to exchange ratifications, probably because of mutual distrust and the small faith which the parties had in each other. The practice of ratification having been established, it came to be considered that the treaty was not binding unless ratified, and consequently a monarch, if he did not care to be bound, would refuse to ratify, and the question thus came to be discussed whether the monarch could refuse to ratify that which his agents had done under full powers from him.

Had the treaty been expressed as between the monarchs alone, then they would have executed the writing, and by so doing have ratified that which their agents had done in negotiation, but not have ratified a treaty which would only have come into existence when they so executed it. It frequently happened, however, that the treaty thus drawn up by the plenipotentiaries was not satisfactory to the monarch, and furthermore it perhaps more frequently

¹⁴ See §352, ante. ¹⁵ See §353, ante. ¹ See §354, ante. ² See §355, ante.

happened that he changed his mind since sending them to the place of negotiation or something had happened which made him think he had lost an ulterior advantage by making the treaty.

The disadvantage of binding the prince to comply with the engagements of his plenipotentiaries was obvious, and it seems to have been generally understood that the monarch could, for sufficient reason, refuse to ratify. This gave rise to the further discussion of what was a sufficient reason.

The phrase "right of ratification" sometimes used by the writers, means power of ratification, as to which no question was ever raised.³

When the government is limited and the people have a voice in the determination of their own affairs, it is absolutely out of the question for any plenipotentiaries appointed by the head of the state to bind it by any agreement.⁴ Many writers still continue to discuss the question of whether ratification may be refused, which is entirely needless in modern times. The various organs of the government will act as they think best for the interest of the people, and refusals to ratify are quite common and excite no comment whatever among practical statesmen.

Limited, partial, or conditional ratifications are of frequent occurrence, and the treaty in such case must fail of effect unless submitted again to the other party with the modifications and approved by it.⁵

Cartels, truces, capitulations and armistices are entered into by military commanders in time of war and are not usually subject to ratification, the reason being that the agreements relate to a special matter in connection with the conduct of the war, and they are of such a nature as to require immediate action. The cumbersome process of ratification would impose intolerable delays which would generally defeat the objects sought to be accomplished.⁶ Confirmation of treaties was quite common in western Europe, prior treaties between the same parties being referred to, and confirmed in subsequent agreements. This was only a mode of securing fresh evidence of the continuing assent of the states concerned, and of no importance from a legal point of view.⁷

The classification and names of treaties are involved in great obscurity and no logical or practical conclusions can be drawn from the discussions of the writers.⁸ Treaties are, in the first place, executed or unexecuted, and as to the subject matter may be classified as follows:

³ See §356, ante.

⁴ See §357, ante.

⁵ See §358, ante.

⁶ See §359, ante.

⁷ See §360, ante.

⁸ See §361, ante.

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of members. The names are written in a cursive script, and the addresses are listed below them.

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Summary

is the only party to a treaty and therefore the obligation does not extend to the individual members of the state so far as provided by municipal law, and a failure of a state to make its municipal law conform to the terms of the treaty is a failure to carry out the provisions of the instrument.¹⁸

Question as to the internal effect of the treaty is therefore a question of municipal law which sometimes causes difficulty in unitary governments, with a distribution of the powers into executive, judicial and legislative, but is not within the purview of international law.¹⁹

Distinction between an executed and an executory treaty has been overlooked by some of the writers. In the case of an executory treaty, there is still something to be performed by one or more of the parties, and the binding force, so far as there is a binding force, continues so long as that performance is due. When the treaty is fully executed, it is *functus officii*. There is no obligation and the treaty is a mere muniment. It is supposed, however, that in this case there is an obligation of some sort surmounting the treaty, a notion which, it is apprehended, is purely fanciful and without weight.²⁰

There are two questions in municipal law which are not clearly answered by the writers. The first is—is the treaty binding? The second is—assuming that it is, are there any excuses for its non-performance which may be recognized?

A treaty is binding in municipal law, that is, has been fully executed, when there is no escape from its obligation except by some recognized excuse. If it is not binding, then the question of non-performance is not reached, but the party may set up a refusal to be bound and say that there never was a valid contract. The doctrine of non-performance is a development of modern and refined law, and probably little known among primitive tribes where the doctrine of self-help prevails. As may be expected, therefore, in the international world at the present time the doctrine of excuse is of great importance.

A treaty is binding in municipal law because of (A) the attitude of the state which considers itself bound in honor, (B) the judicial power of the state in case of a dispute, and (C) the fear of public condemnation visited because of failure to perform the contract and the disastrous personal effect of the failure

¹⁸ §371, ante.

¹⁹ See §372, ante.

²⁰ See §373, ante.

(1) Those relating to state territory, as treaties of boundary and cession, and neutralization of particular places. (2) Those relating to political conduct of states to each other and with respect to third states. (3) Those relating to the open sea. (4) Those relating to the treatment of members of one state within the jurisdiction of another. (5) Those providing for exercise of state functions by one state on the territory of another. (6) Those providing for joint administrative functions. (7) Those providing for identity of private municipal law or providing for regulation of conflicts therein. (8) Those applying to a third state. (9) Those relating to a state of war between the parties.⁹ No classification can be exhaustive, as the changing aspect of international affairs will continually present new subjects for international agreement.

A federal constitution is the result of a treaty between several states, just as marriage is the result of the previous engagement to marry.¹⁰

Since there is no political power superior to the independent states of the world, the only obligation to the performance of a treaty arises from the operation of the international factors of conduct. The conception of an obligation to carry out a promise is an integral part of civilized opinion and essential to the existence of the modern world. Public opinion, therefore, is a powerful factor inducing an independent state to fulfill its treaty obligation.¹¹ This opinion has prevailed from the earliest times.¹²

Monarchs, however, had little trust in one another and various expedients were resorted to, as oaths, hostages, pledges and guarantees, in the effort to add to the binding obligation of a treaty.¹³ All these are now of historical interest except guarantees by a third party. Opinion and practice were strong in favor of the binding force of the treaty, and there is little doubt that more treaties have been kept than broken.¹² The obligation of a treaty is founded solely on the operation of the international factors of conduct, and it is misleading to attempt to draw an analogy between international agreements and contracts in the municipal law enforced by the political power of the state. The rise of limited governments and the disappearance of the personal power of the monarch, however, have strengthened the opinion and practice in favor of the binding force of treaties.¹⁴

⁹ See §364, ante.

¹⁰ See §365, ante.

¹¹ See §369, ante.

¹² See §368, ante.

¹³ See §367, ante.

¹⁴ See §370, ante.

The state is the only party to a treaty and therefore the obligation of the treaty does not extend to the individual members of the state except in so far as provided by municipal law, and a failure of a state to make its municipal law conform to the terms of the treaty is simply a failure to carry out the provisions of the instrument.¹⁸

The question as to the internal effect of the treaty is therefore a question of municipal law which sometimes causes difficulty in modern limited governments, with a distribution of the powers into executive, judicial and legislative, but is not within the purview of the international lawyer.¹

The distinction between an executed and an executory treaty is clear but has been overlooked by some of the writers. In the case of an executory treaty, there is still something to be performed by one or both of the parties, and the binding force, so far as there is a binding force, continues so long as that performance is due. When, however, the treaty is fully executed, it is *functus officii*. There is nothing left and the treaty is a mere muniment. It is supposed, however, that in this case there is an obligation of some sort surviving the treaty, a notion which, it is apprehended, is purely fanciful and without weight.²

There are two questions in municipal law which are not clearly distinguished by the writers. The first is—is the treaty binding? The second is—assuming that it is, are there any excuses for its violation which may be recognized?

If the contract is binding in municipal law, that is, has been fully performed, there is no escape from its obligation except by some legally recognized excuse. If it is not binding, *then* the question of excuse is not reached, but the party may set up a refusal to be bound at all because there never was a valid contract. The doctrine of excuse for non-performance is a development of modern and refined jurisdiction, and probably little known among primitive tribes where the doctrine of self-help prevails. As may be expected, therefore, in the international world at the present time the doctrine of excuse is of small importance.

A contract is binding in municipal law because of (A) the attitude of the party who considers himself bound in honor, (B) the judicial remedy afforded by the political power of the state in case of a breach, (C) the fear of public condemnation visited because of failure to keep the contract and the disastrous personal effect of the failure

¹⁸ See §371, ante.

¹ See §372, ante.

² See §373, ante.

to perform one's undertaking, (D) pressure from the other party to the contract.

All these factors are present in international life except that of judicial remedy, and there is here the additional factor of force, which is usually absent or negligible in municipal life. A state will therefore be impelled to observe a treaty by (A) self-interest, which is usually present, (B) international public opinion, (C) pressure from other states.³

The several doctrines of breach by the other party⁴—illegality,⁵ impossibility of performance,⁶ fraud⁷ and inconsistency,⁸ which are of such importance in the municipal law, seem to have little application in international law in its present state of development, although the writers have unsuccessfully attempted to apply the analogies of municipal law to international life.

If the performance of the treaty, in whole or in part, will prove ruinous to the interests of the state, it will be urged that the treaty is null and void; that is, the state may refuse to perform, in this respect laying down a looser rule than that which obtains in municipal law. Few cases have arisen in practice, and the discussion is almost entirely theoretical. It seems clear that the self-interest of the state will assert itself whenever possible and defy the other international factors of conduct. In short, that every state will refuse to carry out a treaty which it regards as ruinous when it is fully strong enough to do so, and that international public opinion will not condemn it for so doing, the only question in doubt being whether the treaty is in fact ruinous, as to which there will always be considerable difference of opinion.⁹

The general opinion is that a change in circumstances will excuse a state from performing a treaty, but there is considerable difference of opinion as to what change in circumstances will amount to such a justification. Here again the principle in international law contended for is more lax than the similar principle in municipal law. There is this circumstance to be noted, that the bodies existing in international life have an infinitely longer period of existence than individuals, and therefore treaties between states will be more frequently complicated by change of circumstances than will the contracts of shorter duration in time entered into by individuals.¹⁰

Duress may be applied to the making of the treaty, or to the performance, and in the latter case we may distinguish duress pre-

³ See §374, ante.

⁴ See §376, ante.

⁵ See §378, ante.

⁶ See §380, ante.

⁷ See §375, ante.

⁸ See §377, ante.

⁹ See §379, ante.

¹⁰ See §381, ante.

venting the performance of the treaty with another state, giving that state ground to complain, and raising the question of whether the state in default can set up the compulsion as an excuse for the failure to perform and duress compelling the performance or promise, when the state which has performed or promised under duress elects to treat the performance or promise as null and void because of the compulsion.¹¹ The principles of the municipal law urged by the writers are inapplicable, as these principles rest on the existence of a political power superior to the compulsion and which can relieve against it,¹² whereas, in the international world, there is no such power, and the application of force is necessarily admitted as a lawful factor of international conduct.¹³

The only case involving the doctrine of *ultra vires* treaty is that where the officers of the state government exceed the powers given them by that government in the making of a treaty. The question which is then presented is whether that treaty is binding. It seems perfectly clear that where the limitation is known, every state dealing with the officers limited will act with knowledge of that limitation, and cannot therefore reasonably be expected to complain if the *ultra vires* treaty is regarded by the people of the state as null and void. In point of theory, however, from an international point of view, the limitation is of no effect, because the limitation being of municipal law, has no effect in international life unless we take the theory that the international functions of a state may be limited by its government, and part of those functions reserved to the people, in which case a government of that kind appears in international life impotent and lame, bare of the full vigor of a monarch parading with all his absolute power.¹⁴

War between the parties will obviously have no effect on an executed treaty, but where the treaty is executory, will suspend further performance between the parties in so far as the hostile relations interfere with that performance.¹⁵ Where the treaty provides for hostilities, then the performance of the treaty is not prevented by the breaking out of the war.¹ In the treaty of peace terminating the war, the states will confirm or reinstate treaties as they see fit.

Although the writers have attempted to lay down rules as to what principles are applicable to the revival of treaties on the termi-

¹¹ See §382, ante.

¹² See §383, ante.

¹³ See §384, ante.

¹⁴ See §386, ante.

¹⁵ See §388, ante.

nation of war, it is believed they have entirely overlooked the facts of the case, which are—that it depends entirely on the agreement of the parties.¹

The international appearance and disappearance of a state will affect treaties to which they are parties, but there is no principle of international law applicable, as the circumstances of each case govern. Ordinarily, it is to the interest of each state to observe all treaties to which it is a party or which may be said to be binding upon it, and therefore in such cases of disturbance in international life, the parties concerned will by special agreement take care of existing treaty obligations.²

Where a state appears on the international horizon, as by revolt, it obviously is not a party to any treaty, and the question is not whether it will continue to perform treaties to which it was a party, but whether it is in any way bound by the treaties made by the state of which it was formerly a member.³ Where, however, a state disappears into another state, then the question is whether the state into which the disappearance takes place, will assume any of the obligations of the former treaties of the disappearing state. In this case ordinarily there is an agreement as to the adjustment of the obligations under existing treaties.⁴

It is obvious that the change of government, however, can have no effect upon the obligation of the state, which, as we have seen, is an organism continuing its existence irrespective of change of government, which government is only an organ for participation in international life. Many cases have occurred of anarchy and violent change of government, and the almost universal practice has been for the succeeding government to assume the obligations under existing treaties.⁵

In the case of a cession of territory, the question arises of how far the obligation under the treaty of the ceding state will pass with the territory to the state to which the cession is made. This case has been discussed by the writers at length but no case has arisen in practice involving any controversy, as the universal practice has been for the state bodies to enter into an agreement adjusting the application of any existing treaty.⁶

The question whether a treaty binds third states is doubtful, and no case has been found in practice raising the point. A third state

¹ See §390, ante.

² See §392, ante.

³ See §392, ante.

⁴ See §393, ante.

⁵ See §394, ante.

⁶ See §395, ante.

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Summary

may become a party to a treaty already made, which is the case of accession, and instances of this kind have frequently occurred. Adhesion is where the third state becomes a party to a treaty with regard only to a part or on certain principles laid down in the treaty.⁷

The interpretation of a treaty is a matter of construction and detailed discussion of which has been omitted.⁸ It is obvious that a treaty may have an effect on the independence of a state, which may by a treaty bind itself to another state in a manner entirely destructive of its independence. The question, whether a treaty limits the independence of a state is entirely a question of the construction of that particular treaty.⁹

The law-making effect of treaties has been extensively discussed and it has been supposed that treaties make law. In so far as a treaty assumes to lay down a certain principle and that treaty is adhered to by the great number of states, and the conduct thus described is followed by the states concerned in obedience to the provisions of the treaty, there seems to be room to argue that the treaty is somewhat in the nature of a legislative act, and therefore has in a certain sense a law-making effect in so far as we confine the word "law" to the statutory law. It also appears that many cases of international conduct have originated in provisions of particular treaties, and that the increasing number of those treaties, extending over a long period of time and made between a great many states, has finally brought international practice into a consistent and orderly form which is followed for such a length of time that finally the states find themselves impelled to continue that conduct even in the absence of any treaty provisions. In these cases the continued making of the treaties may be said to have an effect in fixing or establishing a rule of international conduct.¹⁰

The phrase "termination of treaties" is used by the writers in a very loose way, which has been fully discussed in the text. A treaty will come to an end just as a contract will, either by being fully performed or because of failure of one or both of the parties to further continue the performance.¹¹ A treaty may provide for continuing performance for an indefinite period and therefore have a certain perpetual aspect. Such a treaty, however, may come to an end just as any other treaty. The treaty may provide particularly for the method by which either of the parties may by notice terminate

⁷ See §396, ante.

⁸ See §397, ante.

⁹ See §398, ante.

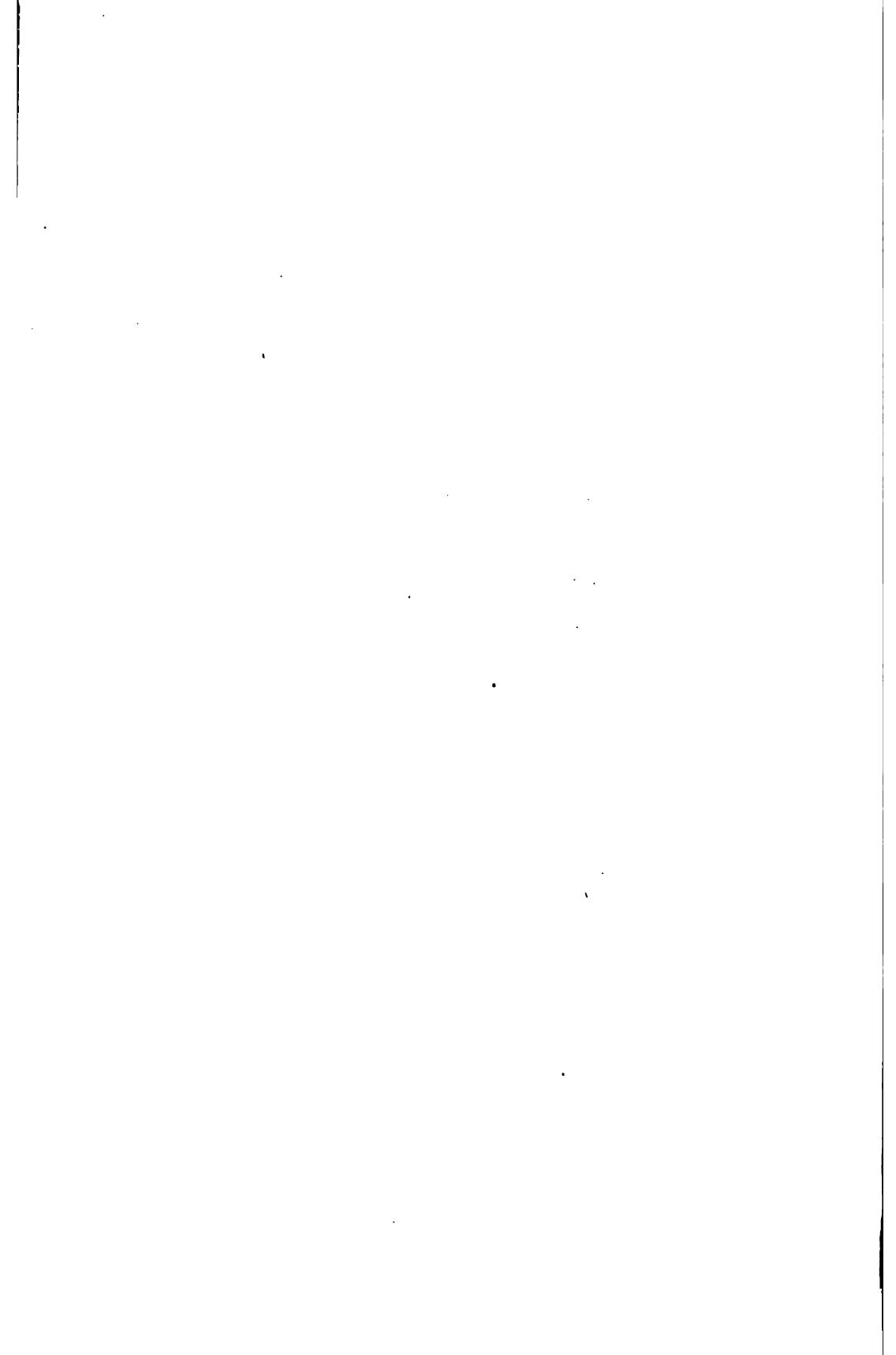
¹⁰ See §399, ante.

¹¹ See §401, ante.

it, just as a lease in the municipal law provides for a termination by notice.

A treaty goes into effect at the time prescribed by its terms, and if no time is fixed it is usually regarded as going into effect as of its date.¹²

¹² See §400, ante.



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